Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

TENNESSEE STUDENT ASSISTANCE CORPORATION,

Petitioner,

v.

PAMELA L. HOOD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress has the authority to abrogate state sovereign immunity under the Bankruptcy Clause of Article I, U.S. Const., art. I, § 8, cl. 4.

LIST OF PARTIES

In addition to the parties named in the caption, the United States of America, its Department of Education, and University Account Services were also listed as parties in the adversary proceeding filed in the bankruptcy court. Only the parties named in the caption were parties on appeal.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General and Reporter of Tennessee, on behalf of the Tennessee Student Assistance Corporation, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-26) is reported at 319 F.3d 755 (6th Cir. 2003). The opinion of the bankruptcy appellate panel (App. 27-60) is reported at 262 B.R. 412 (6th Cir. BAP, filed May 22, 2001). The opinion of the bankruptcy court (App. 62-81) is reported at 2000 WL 33965623 (Bankr. W.D. Tenn., filed July 24, 2000).

JURISDICTION

The court of appeals entered its judgment on February 3, 2003. No party sought rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Bankruptcy Clause of the Constitution grants the following power to Congress:

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States.

U.S. Const., art. I, § 8, cl. 4.

Bankruptcy Code, 11 U.S.C. § 106 provides in pertinent part:

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Section[ ] . . . 523 . . . of this title.

Bankruptcy Code, 11 U.S.C. § 523 provides in pertinent part:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –

. . .

(8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

STATEMENT OF THE CASE

The Bankruptcy Code establishes many exceptions to the discharge of debts after the completion of a bankruptcy case. 11 U.S.C. § 523(a). One of the types of debt that is excluded from discharge is a debt for an educational loan guaranteed by a governmental unit or made under any program funded in whole or in part by a governmental unit. The only limitation of this exception is when the repayment of such a student loan will impose an undue hardship on the debtor and the debtor's dependents. 11 U.S.C. § 523(a)(8). To qualify for the hardship discharge provision, a debtor must file an adversary proceeding against the party to whom the debt is owed.

Between July 1988 and February 1990, respondent signed promissory notes for student loans guaranteed by petitioner, the Tennessee Student Assistance Corporation (hereafter, "the State" or "TSAC"). App. 29. TSAC is a governmental corporation created by the Tennessee legislature to administer student assistance programs authorized by law and to guarantee student loans and loans to a student's parents under the provisions of the federal Higher Education Act of 1965, as amended. Tenn. Code Ann. §§ 49-4-201, *et seq.*; 49-4-401.

On February 26, 1999, respondent filed a "no-asset" Chapter 7 bankruptcy in the United States Bankruptcy Court for the Western District of Tennessee, Western Division. App. 29. Sallie Mae Service, Inc., submitted a claim to the bankruptcy court, which it subsequently assigned to the State. However, the State did not itself ever file a claim in the bankruptcy case. App. 6, 29.

Respondent received her general discharge on June 4, 1999, without addressing her student loans. She subsequently reopened the case on September 14, 1999, and on October 14, 1999, she filed a complaint for hardship discharge under 11 U.S.C. § 523(a)(8), naming the United States of America, its Department of Education and Sallie Mae Service, Inc., as defendants. On February 22, 2000, respondent amended the complaint to add the State as a defendant. At the time of filing the complaint, respondent owed the State $4,169.31. App. 29-30.

The State filed a motion to dismiss the complaint, arguing that the bankruptcy court did not have jurisdiction over TSAC based on its sovereign immunity as a state agency. Following a hearing, the bankruptcy court denied the State's motion. App. 29-30. In its decision, the bankruptcy court found that TSAC was a state agency entitled to assert the protection of sovereign immunity under the Eleventh Amendment, but that Congress validly abrogated that immunity when it enacted 11 U.S.C. § 106(a). The bankruptcy court based its decision on both the presumption of constitutionality of the statute and on the need for uniformity in application of the bankruptcy laws. App. 65, 79-80.

The State appealed to the United States Bankruptcy Appellate Panel for the Sixth Circuit, which affirmed the bankruptcy court's decision. The bankruptcy appellate panel determined that the states ceded their sovereignty over the bankruptcy discharge as a part of the plan of the Constitutional Convention and that, where there is no sovereignty, there can be no sovereign immunity. App. 60.

The State appealed the bankruptcy appellate panel's decision, but the court of appeals affirmed for essentially

the same reasons as stated by the bankruptcy appellate panel. At oral argument, respondent claimed for the first time that the State had waived its sovereign immunity because a proof of claim had been submitted to the bankruptcy court by Sallie Mae, the initial creditor for respondent's student loans, which subsequently assigned the claim to the State. The court of appeals panel majority ruled that this argument had been waived by respondent as a result of her failure to raise it before the bankruptcy court, the bankruptcy appellate panel, or in her brief in the court of appeals.[1] App. 6-8, 21-22. One member of the court would have accepted her argument and concluded that the State had waived its immunity by virtue of a proof of claim filed by a third party with respect to a debt that was subsequently assigned to the State. App. 22-26.

On the issue of the effect of the Bankruptcy Code on the State's sovereign immunity, the court of appeals ruled that Congress validly abrogated the states' sovereign immunity through the exercise of its power under the Bankruptcy Clause, U.S. Const. art. 1, § 8, cl. 4, because the states had, in ratifying that provision, already agreed to the elimination of their immunity with respect to bankruptcy laws. App. 17-21.

In reaching this decision, the court of appeals relied extensively on its own interpretation of the Federalist Papers, notably The Federalist Nos. 32 and 81. It noted that this Court had relied heavily on The Federalist No. 81

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[1] Not only was the issue not raised until oral argument in the court of appeals, the record on appeal does not include either the proof of claim submitted by Sallie Mae or the document assigning the claim to TSAC. App. 6-8.

in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), but apparently concluded that this Court had overlooked a key portion of The Federalist No. 81, and its relationship to The Federalist No. 32. Based on its reading of those two papers, the court of appeals concluded that there had been a waiver of the state's immunity "in the plan of the convention" with respect to bankruptcy cases. Hence, it did not view this Court's holding in *Seminole Tribe* as applicable to Congress' power to abrogate state immunity under its Bankruptcy Clause powers, despite this Court's express references to the bankruptcy power in both the majority and dissenting opinions. App. 17-22.

On the State's motion, the court of appeals stayed the mandate to allow time to file this petition, and thereafter until this Court disposes of the case. App. 84-85.

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals' Decision Conflicts with Decisions of Five Other Circuits and Diverges from This Court's Holdings That Congress Lacks Authority to Abrogate Sovereign Immunity Through the Exercise of an Article I Power.

1. The Decision Below Conflicts with Those of All Other Circuits That Have Addressed the Issue.

The court of appeals' decision is in direct conflict with the decisions of five other circuit courts. *See Nelson v. LaCrosse County Dist. Attorney (In re Nelson)*, 301 F.3d 820, 832 (7th Cir. 2002); *Mitchell v. Franchise Tax Bd. (In re Mitchell)*, 209 F.3d 1111, 1121 (9th Cir. 2000); *Sacred Heart Hosp. of Norristown v. Pennsylvania (In re Sacred Heart Hosp. of Norristown)*, 133 F.3d 237, 243 (3d Cir. 1998); *Fernandez v. PNL Asset Mgmt. Co. LLC (In re Fernandez)*, 123 F.3d 241, 243 (5th Cir.), *amended by* 130 F.3d 1138, 1139 (5th Cir. 1997); *Schlossberg v. Maryland (In re Creative Goldsmiths of Washington, D.C.)*, 119 F.3d 1140, 1145-46 (4th Cir. 1997), *cert. denied*, 523 U.S. 1075 (1998). No other circuit has ruled that Congress has the authority to subject a state to an individual's suit in a bankruptcy court by abrogating sovereign immunity through the exercise of Article I powers in 11 U.S.C. § 106(a). Absent intervention by this Court, it will be impossible to reconcile the difference in treatment of states' sovereign immunity between the Sixth Circuit and the other circuits that have ruled on the issue.

In the decisions of the Third, Fourth, Fifth, and Ninth Circuits, the courts unhesitatingly accepted and applied this Court's holding in *Seminole Tribe* to Congress' Article I Bankruptcy Clause power, finding no meaningful difference between that power and any of Congress' other Article I powers. In *Schlossberg*, the Fourth Circuit rejected the argument that "the states in subscribing to the Constitution conferred on the federal government the power to enact bankruptcy laws for enforcement in federal courts" and stated that "[w]e find unpersuasive the argument of the United States that the Bankruptcy Clause's provision for the enactment of 'uniform laws on the subject of Bankruptcies' . . . requires Congressional powers under this clause to be distinguished from other Article I powers." 119 F.3d at 1145-46.

In *Fernandez*, the Fifth Circuit also rejected the argument that the uniformity provision of the Bankruptcy Clause distinguished it from the clauses dealt with in *Seminole Tribe*. After noting that this Court had explicitly

referred to the effect of its decision on bankruptcy cases, that court found "no principled reason to distinguish in a relevant way Congress' Commerce Clause power that it purported to exercise in *Seminole Tribe* from its power under the Bankruptcy Clause for the purposes of state sovereign immunity." 123 F.3d at 244. In *Sacred Heart*, the Third Circuit echoed the views of the Fifth Circuit. 133 F.3d at 243. And the Ninth Circuit concurred as well in *Mitchell*, holding that "*Florida Prepaid* [*Postsecondary Educ. Expense Bd. v. College Savs. Bank*, 527 U.S. 627 (1999)], which held that Congress cannot abrogate sovereign immunity under the Patent Clause of Article I, reaffirms that there is no exception to *Seminole Tribe* for exclusively federal powers, even those involving exclusive federal jurisdiction. . . . In short, there is no policy-based exception – such as national uniformity – to the *Seminole Tribe* rule that Congress may not abrogate state immunity from suit under Article I." 209 F.3d at 1118. Finally, the Seventh Circuit, in *Nelson*, not only rejected the general version of these arguments but also discussed the precise variation of that argument advanced by the Sixth Circuit and flatly rejected its conclusions. 301 F.3d at 832-33. As a result, there is a square and direct conflict between the Sixth Circuit's holding in this case and the holdings of all five other circuits that have ruled on the issue.

2. The Decision Below Conflicts with This Court's Express Statements in *Seminole Tribe*.

The Sixth Circuit's opinion is in direct conflict with this Court's statements in *Seminole Tribe*. In *Seminole Tribe*, the Court overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), noting that *Union Gas* was the only decision upholding the abrogation of sovereign immunity

under a constitutional provision other than the Fourteenth Amendment. *Seminole Tribe*, 517 U.S. at 66. As this Court stated:

> In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. [footnote omitted] The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.

Seminole Tribe, 517 U.S. at 72-73. Footnote 16, in turn, noted that the dissent "understands our opinion to prohibit federal jurisdiction over suits to enforce the bankruptcy, copyright, and antitrust laws against the States." *Seminole Tribe*, 517 U.S. at 72-73, n. 16. While responding that there were still remedies for enforcing compliance with those laws, so that the dissent's complaint was overstated, the Court plainly agreed that those laws were, indeed, subject to the Court's broadly stated holding on the scope of Congress' Article I powers. Indeed, as the Court noted, "[t]his Court never has awarded relief against a State under any of those statutory schemes." *Id.*

Since *Seminole Tribe*, the Court has consistently held that Congress does not have the authority to abrogate state sovereign immunity through the exercise of any of its

Article I powers (which include the Bankruptcy Clause). *See Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999) (Patent); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (Trademark); *Alden v. Maine*, 527 U.S. 706 (1999) (Commerce – overtime pay); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (Commerce – age discrimination); *Alabama v. Garrett*, 531 U.S. 356 (2001) (Commerce – disability); *Federal Maritime Commission v. South Carolina*, 535 U.S. 743 (2002) (Commerce – maritime commerce). In concluding that bankruptcy is "different," the Sixth Circuit has rejected this Court's clear, unequivocal, and unambiguous statement that Congress may not use Article I powers to authorize suits against states, even where the Constitution "vests in Congress complete law-making authority over a particular area." *Seminole Tribe*, 517 U.S. at 72-73.

3. The Decision Is Based on an Analysis That Was Expressly Repudiated by This Court in *Seminole Tribe* And That Would Be Broadly Applicable to Many Federal Laws If Correct.

As justification for departing from the principle established in *Seminole Tribe* and its progeny, and followed by the circuit court decisions upholding sovereign immunity, the court of appeals explained that none of this Court's sovereign immunity decisions specifically addressed Congress' Bankruptcy Clause power and its relationship to the "plan of the Convention."[2] App. 9.

[2] The Sixth Circuit did not remark on the fact that this Court has decided several cases involving bankruptcy and the Eleventh

(Continued on following page)

Absent a case from this Court expressly addressing the exact argument that it was considering, the court of appeals concluded that it was free to conduct its own analysis of the Framers' intent on the issue. In doing so, the court of appeals interpreted the uniformity requirement of the Bankruptcy Clause as demonstrating that the Framers intended to remove all aspects of sovereignty from the states through "the plan of the Convention." The court of appeals further concluded that, when the states ceded their legislative powers in the area of bankruptcy law, they also ceded all other aspects of sovereignty at that time, including their immunity from suit by private parties. Therefore, despite the unambiguous message of *Seminole Tribe* and its progeny, the court of appeals ultimately concluded that the states had given Congress the power to abrogate their sovereign immunity through the ratification of the Constitution and its Bankruptcy Clause and that Congress validly exercised that power in 11 U.S.C. § 106(a). App. 17-19. Thus, it apparently concluded that this Court's statements directly referencing the application of *Seminole Tribe* to bankruptcy cases were dicta that could be disregarded as inaccurate in the

Amendment, all on the assumption that the Amendment *does* apply to bankruptcy cases as a general matter. *See Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989); *Gardner v. New Jersey*, 329 U.S. 565 (1947); *Ashton v. Cameron County Water Imp. Dist. No. 1*, 298 U.S. 513 (1936); *New York v. Irving Trust Co.*, 288 U.S. 329 (1933). Under the Sixth Circuit's analysis, none of the decisional analysis undertaken by this Court in those cases was necessary, since in its view the states had already waived their immunity completely with respect to bankruptcy when they ratified the Constitution. App. 17-21.

absence of express consideration of the points that the court of appeals viewed as dispositive.[3]

The Sixth Circuit's exact analysis, though, with its connection of the "plan of the convention" language in The Federalist No. 81 to the discussion of preemption of state laws in The Federalist No. 32, and its finding of a correlative waiver of immunity from suit in areas where such preemption exists, has been repeatedly debated within this Court on prior occasions. It is the crux of the argument in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), where Justice Brennan stated – in dissent – that:

> The States retained their full sovereign authority over state-created causes of action as they did over their traditional sources of revenue. See The Federalist No. 32 (discussing taxation). On the other hand, where the Federal Government, in the "plan of the convention," had substantive lawmaking authority, the States no longer retained their full sovereignty and could be subject

[3] In a footnote in *Seminole Tribe*, the majority responded to concerns about the effect of its decision on bankruptcy cases by noting that the court of appeals' case cited by the dissent (*In re Merchants Grain*, 59 F.3d 630 (7th Cir. 1995)) was based on *Union Gas*, which the majority opinion explicitly overruled. 517 U.S. at 72, n. 16. The Court granted certiorari in *Merchant's Grain* shortly after *Seminole Tribe* issued, vacated the decision, which denied immunity to the state, and remanded it for reconsideration in light of its decision in *Seminole Tribe*. *Ohio Agric. Commodity Depositors Fund v. Mahern*, 517 U.S. 1130 (1996). In addition to the majority's language in footnote 16 in *Seminole Tribe*, bankruptcy was also referenced by the dissent in three places. 517 U.S. at 77, n. 1; at 90, n. 12; and at 93-94. At a minimum, it cannot be said that this Court was unaware of the fact that its decision would have an impact upon bankruptcy cases.

> to suit in federal court. . . . In these areas, in which the Federal Government had substantive lawmaking authority, Article III's federal-question grant of jurisdiction gave the federal courts power that extended just as far as the legislative power of Congress. . . .

473 U.S. at 277-78. Justice Brennan went on to state in footnote 25:

> Hamilton used the phrase "plan of the convention" frequently as a synonym for the Constitution. . . . In No. 32, . . . Hamilton had said that "as the plan of the convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act exclusively delegated to the United States." . . . Therefore, the States had surrendered their immunity from suit on federal causes of action when the Constitution was ratified. . . . Again, insofar as the states have thus given up powers to the Federal Government in the "plan of the convention," they are no longer full sovereigns and may be subjected to suit.

473 U.S. at 277, n. 25.

Similarly, in *Union Gas*, the plurality stated "[w]e have recognized that the States enjoy no immunity where there has been a surrender of this immunity in the plan of the convention. . . . [T]o the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable. The States held liable under such a congressional enactment are thus not 'unconsenting'; they gave their

consent all at once, in ratifying the Constitution containing the Commerce Clause, rather than on a case-by-case basis." *Union Gas*, 491 U.S. at 19-20 (internal citations and quotations omitted).

In short, the decision below is nothing more than a return to the arguments made in *Atascadero* and *Union Gas*. Those arguments, however, are not the law of the land. The failure to recognize the similarity of the arguments or even to cite and discuss those prior opinions is the only basis on which the court below could avoid the square conflict between its position and that expressed by this Court in *Seminole Tribe* and its progeny.

The only suggestion in the court of appeals' opinion of some additional factor beyond those discussed in *Atascadero* and *Union Gas* is its reliance upon the uniformity language of the Bankruptcy Clause. In its view, that language has some additional constitutional significance that distinguishes the Bankruptcy Clause from the Commerce Clause or the Indian Commerce Clause. App. 12-14. That view, though, also squarely conflicts with this Court's holding in *Federal Maritime Commission*. There, the Court rejected the plaintiffs' argument that the need for uniformity in the regulation of maritime commerce warranted a finding that the states had granted Congress the power to abrogate their immunity in connection with that legislative power. 535 U.S. at 767-768. Uniformity, so far as can be determined from the Sixth Circuit's opinion, is simply another way of saying that Congress has been given the utmost power to exclude states from legislating in the area in question. But this Court has already ruled

in *Seminole Tribe* that the degree of congressional power is irrelevant to the issue of state immunity from suit.[4] If the Sixth Circuit's view were correct, there is no reason why it should be limited to the Bankruptcy Clause. To the extent that power is given to Congress to preempt state legislation in any area, it would thus have the same power to abrogate state immunity that the Sixth Circuit argues for with respect to the Bankruptcy Clause. In short, the argument would have returned full circle to the position espoused in *Union Gas*.

Review by this Court of the court of appeals' decision is warranted, given its divergence from the holdings of all other circuit courts ruling on the issue and from the principle consistently upheld by this Court – that Congress cannot abrogate states' sovereign immunity through exercise of an Article I power.

B. This Case Presents an Important Issue with the Potential to Affect States Outside the Sixth Circuit.

Resolution by this Court of the conflict between the decision below and the decisions of other circuit courts is also needed because the Sixth Circuit's decision will affect

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[4] Indeed, the Court suggested in *Seminole Tribe* that the Indian Commerce Power was perhaps the most plenary power in the Constitution as regards the relationship between the United States and the States, yet concluded that that fact gave Congress no power to abrogate state immunity. 517 U.S. at 62-63. *A fortiori*, the same is true of the Bankruptcy Power which limits states only when and if the federal government actually chooses to legislate on the subject. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 196 (1819); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827).

states located outside its territorial jurisdiction. The issue in this case could affect each of the fifty states and the territories of the United States. Given the national platform on which a great many businesses operate and the mobility of individual debtors, it is likely that any of the states or territories could be hailed into bankruptcy court in one of the districts situated in the Sixth Circuit. Indeed, the same issue is currently pending before the Sixth Circuit in another case involving the Commonwealth of Massachusetts, arising out of *In re Service Merchandise*, 265 B.R. 917 (M.D. Tenn. 2001), where the District Court found states entitled to sovereign immunity in bankruptcy. *H.J. Wilson Co., Inc. v. Massachusetts Commonwealth*, No. 01-6050 (6th Cir. oral argument scheduled June 17, 2003). That case did not involve a student loan discharge, but an adversary proceeding for determination of the debtor's tax liability and for a refund of any excess taxes paid. An appeal in that case is currently pending before the Sixth Circuit following briefing. That case will likely be controlled by the decision in this case.

In addition to subjecting states to the indignity of suits without their consent, the economic costs to states could be overwhelming. The costs of travel and retention of local counsel alone could well present crisis situations in these treacherous economic times for states forced to defend suits in distant courts at the hands of private litigants. This would be particularly true if debtors are able to force states to appear at a time of their own choosing even in the absence of any actual collection efforts by the state.

The burdens placed on the states by the court of appeals' decision are only exacerbated by the increasing

number of bankruptcy cases filed each year across the country. Filings for the last year exceeded 1.5 million; and the number continues to swell. The problem is made even greater by the extremely liberal venue provisions in the Bankruptcy Code; business entities, in particular, may file wherever even a single affiliate has established its "domicile" for the greater part of 180 days prior to the filing. *See* 28 U.S.C. § 1408. If this decision is allowed to stand, it is not difficult to imagine the prospect of individual and corporate debtors with significant obligations to a state agency establishing a presence in one of the states in the Sixth Circuit's jurisdiction simply to avoid the rulings of all of the circuits that have so far upheld the states' sovereign immunity in bankruptcy cases.

In sum, the court of appeals' decision creates a conflict with the decisions of five other circuit courts and is inconsistent with this Court's decisions disallowing abrogation of sovereign immunity by the exercise of Article I powers. Such inconsistency creates great uncertainty among the states regarding their protection from lawsuits by individuals and businesses who choose to file bankruptcy.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2003 FED App. 0038P (6th Cir.)
File Name: 03a0038p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

In re: PAMELA L. HOOD, *Debtor.*	
PAMELA L. HOOD, *Appellee,* v. TENNESSEE STUDENT ASSISTANCE CORPORATION, *Appellant.*	No. 01-5769

On Appeal from the Bankruptcy Appellate Panel of the Sixth Circuit.
No. 99-22606 – David S. Kennedy, Bankruptcy Judge.

Argued: September 20, 2002

Decided and Filed: February 3, 2003

Before: KENNEDY and MOORE, Circuit Judges; DOWD, District Judge.*

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* The Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

COUNSEL

ARGUED: Marvin E. Clements, Jr., OFFICE OF THE ATTORNEY GENERAL, BANKRUPTCY & COLLECTION DIVISION, Nashville, Tennessee, for Appellant. Leonard H. Gerson, ANGEL & FRANKEL, New York, New York, for Appellee. **ON BRIEF**: Marvin E. Clements, Jr., OFFICE OF THE ATTORNEY GENERAL, BANKRUPTCY & COLLECTION DIVISION, Nashville, Tennessee, for Appellant. Leonard H. Gerson, ANGEL & FRANKEL, New York, New York, William A. Cohn, COHN LAW FIRM, .Cordova, Tennessee, for Appellee. Elise W. Porter, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Columbus, Ohio, Richard N. Coglianese, OFFICE OF THE ATTORNEY GENERAL, EMPLOYMENT LAW SECTION, Columbus, Ohio, Michelle T. Sutter, OHIO ATTORNEY GENERAL, Columbus, Ohio, for Amicus Curiae.

MOORE, J., delivered the opinion of the court, in which DOWD, D. J., joined. KENNEDY, J. (pp. 20-22), delivered a separate concurring opinion.

OPINION

KAREN NELSON MOORE, Circuit Judge. The Tennessee Student Assistance Corporation ("TSAC") appeals from the Bankruptcy Appellate Panel's decision denying TSAC's motion to dismiss for lack of jurisdiction. After receiving a discharge in her Chapter 7 bankruptcy proceedings, plaintiff Pamela Hood filed for a hardship discharge from her student loans and named TSAC in the complaint. The bankruptcy court denied TSAC's motion to

dismiss on the grounds of sovereign immunity, and the Bankruptcy Appellate Panel affirmed that decision. TSAC now appeals, arguing that the Constitution's Bankruptcy Clause, Art. I, sec. 8, does not give Congress the power to abrogate states' sovereign immunity in 11 U.S.C. § 106(a). Applying the analysis that the Supreme Court set forth in *Seminole Tribe,* we conclude that Article I, section 8 of the Constitution gives Congress the power to abrogate states' sovereign immunity. Accordingly, we **AFFIRM** and **REMAND**.

I. BACKGROUND

On June 4, 1999, Pamela Hood received a discharge on her no-asset Chapter 7 bankruptcy petition. Because 11 U.S.C. § 523(a)(8) prohibits discharge of student debts held by governmental bodies except upon showing of "an undue hardship," on September 14 of that year Hood filed an adversary proceeding for a hardship discharge of her student loans. TSAC, whom Hood had named as a defendant, moved to dismiss the complaint on the grounds of sovereign immunity. The Bankruptcy Court for the Western District of Tennessee denied the motion to dismiss, holding that Congress acted pursuant to a valid grant of constitutional authority when it abrogated the states' sovereign immunity in 11 U.S.C. § 106(a).

A unanimous Bankruptcy Appellate Panel affirmed and ruled that "as a part of the plan of the Constitutional Convention, the States ceded to Congress their sovereignty over bankruptcy discharge matters." *Hood v. Tennessee Student Assistance Corp.* (*In re Hood*), 262 B.R. 412, 413 (B.A.P. 6th Cir. 2001). Although the panel acknowledged that *Seminole Tribe of Florida v. Florida,* 517 U.S. 44

(1996), could be interpreted as precluding Congress from ever abrogating states' sovereign immunity under any of its Article I powers, the panel interpreted *The Federalist No. 81* and *No. 32* to distinguish bankruptcy, along with naturalization, from the rest of the Article I powers. *See Hood,* 262 B.R. at 417-419. The panel noted that, with respect to bankruptcy and naturalization, the Constitution granted Congress the power to establish "*uniform* Laws," U.S. Const. Art. I, § 8, cl. 4 (emphasis added), not mere laws. *Hood,* 262 B.R. at 417. According to the panel, *The Federalist No. 32* shows that Congress's power to make uniform laws required states to surrender their own power to make such laws and thus an important degree of their sovereignty. *Id.* at 418-19. Because limits on sovereignty are by their very nature limits on sovereign immunity, the panel concluded that Congress's power to make laws on bankruptcy carries with it the power to abrogate states' sovereign immunity. *Id.* Congress clearly exercised that power in 11 U.S.C. § 106(a), which specifically abrogated the states' sovereign immunity with respect to actions under § 523.

TSAC timely appealed. We have jurisdiction under 28 U.S.C. § 158 and Federal Rule of Appellate Procedure 6. We review the decision of the bankruptcy court directly, reviewing its factual findings for clear error and its legal conclusions de novo. *Harker v. Troutman (In re Troutman Enters.),* 286 F.3d 359, 363 (6th Cir. 2002).

II. ANALYSIS

Until 1976, a debtor could discharge his or her student loan debts in ordinary bankruptcy proceedings, whether or not the creditor was a state or state agency. If a

state wished to assert an interest in a debtor's assets, the state had to file a claim, thereby waiving its sovereign immunity under *New York v. Irving Trust Co.,* 288 U.S. 329, 333 (1933). In the Education Amendments of 1976, however, Congress gave public entities that issued student loans a significant benefit: Congress prohibited the discharge of student loan debts in ordinary, non-adversary bankruptcy proceedings unless the loan had been in repayment for more than five years. For all loans that had been in repayment for less than five years, however, Congress prohibited discharge unless the debtor initiated a separate adversary proceeding and demonstrated that repaying the state would "impose an undue hardship." Education Amendments of 1976, Pub.L. No. 94-482, § 439A(a), 90 Stat. 2081, 2141 (1976) (codified at 20 U.S.C. § 1087-3 (1976)) (repealed in 1978 and replaced with current 11 U.S.C. § 523(a)(8)). Having received the benefit of a special adversary proceeding that makes it more difficult for debtors to discharge their student loan debts, TSAC here seeks to exploit that benefit by asserting its sovereign immunity and preventing discharge altogether. In other words, TSAC asks if it can have its cake and eat it, too. We conclude that it cannot.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend XI. This bar to federal jurisdiction also extends to suits against a state by its own citizens. *See Hans v. Louisiana,* 134 U.S. 1, 10 (1890). Thus private suits against states may proceed only if the state waives

its sovereign immunity or if Congress, acting pursuant to a valid constitutional authority, abrogates the state's sovereign immunity.

A. Waiver of Sovereign Immunity

At oral argument, for the first time in these proceedings, Hood suggested that TSAC may have waived its sovereign immunity; in a subsequent letter brief to the court, Hood suggested that material not appearing in the Bankruptcy Court's docket sheet demonstrated that TSAC had in fact waived its sovereign immunity. Specifically, Hood argues that TSAC's sovereign immunity was waived when Sallie Mae, the initial creditor for Hood's student loans, submitted a proof of claim in Hood's original, non-adversary discharge proceeding and assigned its proof of claim to TSAC. Neither TSAC nor Sallie Mae took any further action on the claim in that proceeding, and the proof of claim was never entered on the court's docket sheet.

Hood waived this argument by failing to raise it before the Bankruptcy Court, the Bankruptcy Appellate Panel, or in her briefs before this court. "'It is well-settled that this court will not consider arguments raised for the first time on appeal unless our failure to consider the issue will result in a plain miscarriage of justice.'" *Overstreet v. Lexington-Fayette Urban County Gov't,* 305 F.3d 566, 578 (6th Cir. 2002) (quoting *Bailey v. Floyd County Bd. of Educ.,* 106 F.3d 135, 143 (6th Cir. 1997)). None of the circumstances that occasionally justify abandoning this usual rule are present here. As an initial matter, failing to consider Hood's waived argument hardly results in a plain

miscarriage of justice; indeed, Judge Kennedy's consideration of the issue that was waived leads her to the same conclusion that we reach on the issue that was properly preserved. Nor do we believe that the issue "is presented with sufficient clarity and completeness" and that "its resolution will materially advance the progress of . . . already protracted litigation" such that it warrants special consideration under *Pinney Dock & Transport Co. v. Penn Central Corp.,* 838 F.2d 1445, 1461 (6th Cir.), *cert. denied,* 488 U.S. 880 (1988). To the contrary, resolution of the waiver issue no more advances the progress of this litigation than does resolution of the abrogation issue, and resolution of the waiver issue requires reliance on extra-record evidence regarding the significance of an undocketed proof of claim that Sallie Mae filed *after* its officer had executed a document assigning its interest to TSAC. *See also Wright v. Holbrook,* 794 F.2d 1152, 1156 (6th Cir. 1986) (refusing to hear an argument first raised in a reply brief on appeal and noting that consideration of such arguments is inappropriate "when resolution of the issue is not obvious").

The concurring opinion would nonetheless have us rule on the waiver issue in order to avoid addressing the abrogation question. However, in an effort to avoid ruling on one constitutional question, Judge Kennedy is forced to address another: she rules that a state may waive its sovereign immunity simply by doing nothing. That is, the concurring opinion concludes that Sallie Mae waived Tennessee's sovereign immunity when Sallie Mae assigned a proof of claim to TSAC and the state failed to object. We take no position on whether Judge Kennedy is correct on this point, as the issue is a difficult one. *Compare Gardner v. New Jersey,* 329 U.S. 565, 573-74 (1947) (holding that

when state voluntarily submits a claim in a bankruptcy proceeding, the state waives its sovereign immunity), *with College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999) ("The whole point of requiring a 'clear declaration' *by the State* of its waiver is to be certain that the State in fact consents to suit.") (emphasis in original), *and Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (rejecting theory of constructive consent and finding waiver of state sovereign immunity only when state expressly waives it). But given the choice between ruling on a constitutional question that was presented below and a constitutional question that was not, we will rule on the issue properly presented. We decline to address the newly presented issue whether TSAC waived its sovereign immunity as a result of Sallie Mae's actions.

B. Abrogation of Sovereign Immunity

1. The *Seminole Tribe* Framework

The Supreme Court has addressed the question of valid abrogations of state sovereign immunity in a series of cases that began with *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). In *Seminole Tribe*, the Court ruled that the Indian Commerce Clause, which authorizes Congress to "regulate Commerce ... with the Indian Tribes," U.S. Const., Art. I, § 8, cl. 3, does not grant Congress the power to abrogate state sovereign immunity. *See Seminole Tribe*, 517 U.S. at 47. The Court in *Seminole Tribe* first ruled that Congress had adequately expressed its intent to abrogate the states' immunity from suit. *See id.* at 56. In the second part of its inquiry, however, the Court ruled that in attempting to abrogate state sovereign immunity, Congress had exceeded its constitutional power. Looking to *The Federalist* and other statements of the

Framers, the Court determined that state sovereign immunity was an essential element of the Constitution's original structure. *See id.* at 69-71. Accordingly, the Court held that "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id.* at 72-73. The Court applied a similar two-step, historical analysis in *Alden v. Maine*, 527 U.S. 706 (1999), wherein it extended *Seminole Tribe* to limit Congress's powers with respect to suits in state court as well.

Five circuit courts have concluded that under *Seminole Tribe*, Congress may not validly abrogate state sovereign immunity relying on its Bankruptcy Clause powers. *See Nelson v. La Crosse County Dist. Attorney* (*In re Nelson*), 301 F.3d 820, 832 (7th Cir. 2002); *Mitchell v. Franchise Tax Bd.* (*In re Mitchell*), 209 F.3d 1111, 1121 (9th Cir. 2000); *Sacred Heart Hosp. of Norristown v. Pennsylvania* (*In re Sacred Heart Hosp. of Norristown*), 133 F.3d 237, 243 (3d Cir. 1998); *Fernandez v. PNL Asset Mgmt. Co. LLC* (*In re Fernandez*), 123 F.3d 241, 243 (5th Cir.), *amended by* 130 F.3d 1138, 1139 (5th Cir. 1997); *Schlossberg v. Maryland* (*In re Creative Goldsmiths of Washington, D.C.*), 119 F.3d 1140, 1145-46 (4th Cir. 1997), *cert. denied*, 523 U.S. 1075 (1998). These circuits have relied primarily on *Seminole Tribe's* broad language barring Congress from abrogating state sovereign immunity pursuant to its Article I powers. However, neither *Seminole Tribe* nor any of the Supreme Court's other recent sovereign immunity cases address Congress's Bankruptcy Clause powers as understood in the plan of the Convention. We engage in the *Seminole Tribe* analysis, and we conclude that the text of the Constitution and

other evidence of the Framers' intent demonstrate that under the Bankruptcy Clause of Article I, section 8, Congress has the power to abrogate state sovereign immunity.

The *Seminole Tribe* inquiry must proceed in two parts. First, the Supreme Court requires that "to abrogate the States' Eleventh Amendment immunity from suit in federal court . . . Congress must make its intention 'unmistakably clear in the language of the statute.'" *Hoffman v. Connecticut Dep't of Income Maint.*, 492 U.S. 96, 101 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). There is no question here that Congress has done so. Section 106(a) of the Bankruptcy Code states that, "[n]otwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to . . . [section] 523." 11 U.S.C. § 106(a)(1). Subsection (a)(2) then sets forth the degree to which sovereign immunity is abrogated for actions involving § 523: "The court may hear and determine any issue arising with respect to the application of such sections to governmental units." 11 U.S.C. § 106(a)(2). This is "a clear legislative statement." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786 (1991).

Second, and more difficult, is the question whether Congress's attempt to abrogate state sovereign immunity was pursuant to sufficient authority. The statute at issue here was adopted pursuant to Congress's power under Article I, section 8 of the Constitution "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout

the United States."[1] If Congress cannot abrogate sovereign immunity under this provision, the statute is invalid and Hood's suit is barred. The Supreme Court has instructed that, when determining whether Congress may abrogate state sovereign immunity, courts are to look at the original structure of the Constitution. *See Alden*, 527 U.S. at 713 ("[I]mmunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional amendments."). The Eleventh Amendment will neither undermine nor bolster any conclusion regarding the purposes of the Convention, because that amendment sought only to restore, not change, the structure established at the Convention that was apparently distorted by the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). *Alden*, 527 U.S. at 722-23.

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[1] Hood does not argue that the statute was passed under § 5 of the Fourteenth Amendment, which the Supreme Court has recognized provides an adequate basis for abrogation of state sovereign immunity. *See Seminole Tribe*, 517 U.S. at 59. Section 5 authorizes only appropriate legislation designed to remedy violations of the Fourteenth Amendment's substantive provisions, and there must be "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). Courts that have addressed this issue agree that the Bankruptcy Code was not designed to remedy violations of the Fourteenth Amendment. *See, e.g., Sacred Heart Hosp. of Norristown v. Pennsylvania* (*In re Sacred Heart Hosp. of Norristown*), 133 F.3d 237, 243-44 (3d Cir. 1998).

2. The Constitution's Text

Beginning with the Constitution's text, Article I gives Congress the power to make "uniform" laws over only two issues: bankruptcy and naturalization.[2] Granting the federal government the power to make uniform laws is, at least to some extent, inconsistent with states retaining the power to make laws over that issue. The Supreme Court noted the importance of the uniformity provision early on:

> The peculiar terms of the grant certainly deserve notice. Congress is not authorized merely to pass laws, the operation of which shall be uniform, but to establish uniform laws on the subject

[2] In arguing that the Bankruptcy Clause power is no different from other Article I powers, the State urges us to follow Justice Marshall's dissent in *Hoffman v. Connecticut Dep't of Income Maint.*, 492 U.S. 96, 106 (Marshall, J., dissenting), in which Justice Marshall wrote, "I see no reason to treat Congress' power under the Bankruptcy Clause any differently [than the power under the Commerce Clause], for both constitutional provisions give Congress plenary power over national economic activity." *Id.* at 111. The Fourth Circuit interpreted this to mean that when the Supreme Court in *Seminole Tribe* ruled that Congress could not use the Commerce Clause power to abrogate state sovereign immunity, it necessarily indicated that the Bankruptcy Clause power was similarly weak. *See In re Creative Goldsmiths of Washington, D.C.*, 119 F.3d at 1145-46. However, even if Justice Marshall's dissent were binding, his statement cannot bear the weight the Fourth Circuit puts on it. In that passage of *Hoffman*, Justice Marshall was discussing whether, given that the jurisprudence of the time recognized Congress's power to abrogate sovereign immunity under the Commerce Clause, Congress had a similar power under the then-current version of the Bankruptcy Clause. Justice Marshall concluded that there was no reason to think that the Bankruptcy Clause gave Congress *less* power. *See Hoffman*, 492 U.S. at 111. He had no reason to consider whether it gave Congress *more* power. We thus find nothing in the *Hoffman* dissent that would overcome the textual distinction that the Framers created for the uniform powers.

> throughout the United States. This establishment of uniformity is, perhaps, incompatible with state legislation, on that part of the subject to which the acts of congress may extend.

Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 193-94 (1819).

It is worth discussing what the uniformity provision is not. The "uniformity" provision is not, as the Fifth Circuit suggests in *In re Fernandez*, "'a requirement of geographic uniformity' and nothing more." *In re Fernandez*, 123 F.3d at 244 (quoting *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 172 (1946) (Frankfurter, J., concurring)). As an initial matter, this language from Justice Frankfurter's concurring opinion in *Vanston* was inconsistent with the majority opinion in that case. Justice Frankfurter reasoned in *Vanston* that the creditors' claim was invalid under state law, so there was nothing for the bankruptcy court to enforce; as long [sic] Congress treated all claims created under state law uniformly, regardless of the state, the uniformity requirement had been satisfied. *See Vanston*, 329 U.S. at 172-73 (Frankfurter, J., concurring). However, the majority in *Vanston* found no reason to inquire whether state law had created any valid claim, because the asserted claim was inconsistent with federal bankruptcy policies and thus could not be asserted – regardless of its status under state law. *See Vanston*, 329 U.S. at 163-64. On the majority's reasoning, federal courts must do more than treat state laws uniformly; federal courts must enforce federal bankruptcy law. If *Vanston* is any guide as to what uniformity requires, then uniformity requires much more than Justice Frankfurter's concurrence suggests.

Nor, as the following discussion demonstrates, does Article I, section 8 reflect a mere congressional policy favoring uniformity across state borders. Unlike *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank,* 527 U.S. 627 (1999), in which the Supreme Court found that a legislative preference for uniformity could not override a constitutional prohibition on the abrogation of state sovereign immunity, *id.* at 645, this case involves the question whether a constitutional uniformity requirement itself authorizes Congress to abrogate state sovereign immunity.

3. The Framers' Understanding of the Bankruptcy Power

As it was initially understood, the Bankruptcy Clause represented the states' total grant of their power to legislate on bankruptcy. In order for laws to be uniform, the laws must be the same everywhere. That uniformity would be unattainable if states could pass their own laws. Alexander Hamilton stated that the federal government had "exclusive jurisdiction" where the Constitution granted Congress the power to make uniform laws. "This must necessarily be exclusive; because if each State had power to prescribe a DISTINCT RULE, there could be no UNIFORM RULE." *The Federalist No. 32,* at 155 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001). The earliest cases similarly interpreted the grant of power as exclusive, noting that laws could be uniform only if a single agent were issuing them. Associate Justice Bushrod Washington, sitting as Circuit Justice, reasoned this way in *Golden v. Prince,* 10 F. Cas. 542 (C.C.D.Pa. 1814), writing, "That the exercise of the power to pass

bankrupt and naturalization laws by the state governments, is incompatible with the grant of a power to congress to pass uniform laws on the same subjects, is obvious, from the consideration that the former would be dissimilar and frequently contradictory; whereas the systems are directed to be uniform, which can only be rendered so by the exclusive power in one body to form them." *Id.* at 545.

The authority was understood to be exclusive because any lesser grant would have defeated the grant's original purpose. The bankruptcy system before 1789 was marked by chaos. Because each state had different laws, the discharge of a Pennsylvanian's debts might have no effect on his debts in Maryland, and the interests of out-of-state creditors could be subordinated to in-state creditors. This system was not only ineffective, in that it did not allow debtors the fresh start that bankruptcy policies seek, but also ripe for manipulation, in that it would give the Pennsylvania creditor an incentive to assign his interest in the debtor's estate to someone in Maryland, making the debtor no better off after bankruptcy than before. However, the justification for the grant of exclusivity was not a mere desire to have *one* system, but a system that rose above individual states' interests. As Joseph Story noted, there were fears that each state would frame a bankruptcy system that "best suits its own local interests, and pursuits" or that was marked "by undue domestic preferences and favours." 3 Joseph Story, *Commentaries on the Constitution* §§ 1102, 1104 (1833), *in The Founders' Constitution* (Philip B. Kurland & Ralph Lerner eds., 1987). Indeed, setting bankruptcy policies on the state level would enable states to favor in-state creditors over similarly-situated out-of-state creditors. By granting the power to Congress

exclusively, the Constitution prevented runaway states from defeating bankruptcy's goals.

Although this understanding that the federal power was exclusive eventually gave way to an acceptance that states could, in the absence of federal legislation, pass laws on bankruptcy, this development in no way undermines the understanding at the time of the Convention that the grant was exclusive. Congress did not pass its first bankruptcy act until 1800, repealed it in 1803, and was unable to enact further legislation until 1841. *See* David A. Skeel, Jr., *Debt's Dominion: A History of Bankruptcy Law in America* 25 (2001). In the absence of a federal bankruptcy code, states were forced to rely on their own structures, and in 1819 the Supreme Court in *Sturges v. Crowninshield,* 17 U.S. (4 Wheat.) 122 (1819), ruled that the Bankruptcy Clause prohibited states from acting only where Congress had already acted. *Id.* at 193-96. However, the *Sturges* non-exclusivity interpretation was based less on the original understanding of the Convention than on the necessity of having *some* system in place when Congress could not enact bankruptcy legislation. After recounting the concerns over renegade state laws that led to the exclusivity and uniformity clause, Joseph Story noted that *Sturges*'s non-exclusivity interpretation was by 1833

> firmly established by judicial decisions. As this doctrine seems now to have obtained a general acquiescence, it does not seem necessary to review the reasoning, on which the different opinions are founded; although, as a new question, it is probably as much open to controversy, as any one, which has ever given rise to judicial argumentation. But upon all such subjects it seems desirable to adopt the sound practical maxim, *Interest reipublicae, ut finis sit litium.*

Story, *Commentaries,* at § 1109. Thus the later interpretations of the uniformity provision as not creating exclusive power in the federal government reflect administrative necessity rather than an understanding contrary to that expressed in *The Federalist No. 32.* As Hamilton, Story, and the other early interpreters make clear, the uniformity provision was intended to grant exclusive power to the federal government.

4. The States' Ceding of Sovereign Immunity

Of course, it is possible that in ceding some sovereignty with the Bankruptcy Clause, the states ceded their legislative powers but not their immunity from suit. As the *amici* states point out, early Supreme Court decisions that limited states' powers to legislate did not receive the same hostile reception that the Court's decision in *Chisholm v. Georgia,* 2 U.S. (Dall. 419) (1793), which undermined state sovereign immunity, received. This could suggest that the power to legislate and the immunity from suit were distinct aspects of sovereignty in the early Americans' minds, and that the decision to cede one aspect to the federal government does not by itself imply a surrender of the other.

The Federalist suggests that the states shed their immunity from suit along with their power to legislate together when the states agreed to the Bankruptcy Clause's uniformity provision. Two passages are relevant. In *The Federalist No. 81,* Hamilton discussed sovereign immunity as follows.

> It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent.* This is the general sense, and the

> general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of state sovereignty, were discussed in considering the article of taxation, and need not be repeated here.

The Federalist No. 81, at 422 (Alexander Hamilton). The article on taxation, to which Hamilton refers as identifying the circumstances in which states can be said to "alienat[e]" their sovereignty, is *The Federalist No. 32.*

> [A]s the plan of the convention aims only at a partial union or consolidation, the state governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation of state sovereignty, would only exist in three cases: where the constitution in express terms granted an exclusive authority to the union; where it granted, in one instance, an authority to the union, and in another, prohibited the states from exercising the like authority; and where it granted an authority to the union, to which a similar authority in the states would be absolutely and totally *contradictory* and *repugnant.*

The Federalist No. 32, at 155 (Alexander Hamilton). Hamilton specifically offered naturalization as an example of this third alienation of sovereignty, because the grant of a uniform power to the federal government is inconsistent

with any retention of that power in the states; the same reasoning applies to bankruptcy. *See id.*

The question is whether Hamilton's identification of the uniform powers as examples of categories in which states have ceded sovereignty includes the ceding of immunity from suit. We conclude that *No. 32* does in fact refer to the ceding of sovereign immunity. Hamilton's cross-reference to this discussion in *No. 81's* discussion of ceding sovereign immunity can only suggest that, in the minds of the Framers, ceding sovereignty by the methods described in *No. 32* implies ceding sovereign immunity as discussed in *No. 81.* There is no other explanation for his cross-reference in *No. 81.* Thus *The Federalist No. 81* and *No. 32* suggest that the states ceded their immunity by granting Congress the power to make uniform laws.

5. The Ratification Debates

Contrary to the *amici* states' suggestion, this interpretation is consistent with the ratification debates. First, although *amici* are correct that those debating the proposed Constitution's merits objected to certain suits against the states, *amici* point to no such objection specifically targeted against enforcing federal bankruptcy laws against the states. Rather, the bulk of the speakers objected to Article III, section 2, which allows suits between a state and citizens of another state. *See, e.g.,* 3 *Elliot's Debates* 533 (Jonathan Elliot ed., 2d ed. 1836) (statement of James Madison); *id.* at 543 (statement of Patrick Henry); *id.* at 555-56 (statement of John Marshall); *see also id.* at 527 (statement of George Mason) (objecting to federal jurisdiction over suits between state and foreign state, citizens, or subjects). Although the debaters' relative

silence over sovereign immunity and the bankruptcy provision does not necessarily indicate their acquiescence, it does undermine the notion that those ratifying the constitution objected to federal jurisdiction over the states in such cases.

The *amici* states also cite the New York and Rhode Island conventions as conditioning ratification on an understanding that private persons could not sue the states. Like the ratification debates, the ratification resolutions are ambiguous on this front. Although both New York and Rhode Island expressed a preference that citizens never be allowed to sue states in federal court, the resolutions are ambiguous regarding whether they believed that the Constitution actually prohibited such suits. New York's resolution stated that its preference in favor of absolute sovereign immunity was "consistent with the said Constitution." 1 *Elliot's Debates* 329 (New York Resolution). Rhode Island, however, while expressing a preference in favor of absolute sovereign immunity, did so by calling for an amendment to make that preference law. *See id.* at 335-36 (Rhode Island Resolution). There would be no need for such an amendment if, as New York suggested, the Constitution were already clear on this point. Again, this evidence regarding the states' intent is ambiguous.

Those engaging in the state ratification debates were meticulous in raising their objections clause-by-clause, *see, e.g.,* 3 *Elliot's Debates* 543 (statement of Patrick Henry) ("No objection is made to [federal courts'] cognizance of disputes between citizens of the same state."), but none of the debaters objected to subjecting the states to federal suits in bankruptcy. This lack of recorded opposition puts suits in bankruptcy against the states in the same category with other constitutionally-approved limits on

sovereign immunity, such as the provisions subjecting states to suit by the federal government, for example, or to suits between the states. *See, e.g., United States v. Texas,* 143 U.S. 621, 639-40 (1892); 3 *Elliot's Debates* 549 (statement of Edmund Pendleton) ("The impossibility of calling a sovereign state before the jurisdiction of another sovereign state, shows the propriety and necessity of vesting this tribunal with the decision of controversies to which a state shall be a party."). So although the lack of expressed opposition could reflect a gap in an otherwise careful debate, it could also reflect the ratifiers' acceptance that because a federal bankruptcy system could cure the previous systems' ills only if it applied uniformly to all creditors and debtors, the Bankruptcy Clause must grant Congress the power to abrogate the states' sovereign immunity.

III. CONCLUSION

Much of the evidence regarding the plan of the Convention is ambiguous. However, the Supreme Court has made clear that the best evidence of the Framers' intentions on state sovereignty comes from the text of the Constitution and *The Federalist. See, e.g., Printz v. United States,* 521 U.S. 898, 918-21 (1997). Indeed, *Seminole Tribe* itself relies heavily on *The Federalist No. 81. See Seminole Tribe,* 517 U.S. at 54, 69, 70 n.13. Here, the Constitution's text and Hamilton's reference in *The Federalist No. 81* to the means of abrogating sovereignty in *The Federalist No. 32* suggest that, with the Bankruptcy Clause, the states granted Congress the power to abrogate state sovereign immunity. The states' immunity was thus "altered by the plan of the Convention." *Alden,* 527 U.S. at 713. Congress

clearly exercised that power in 11 U.S.C. § 106(a). Accordingly, TSAC is not immune from suit under 11 U.S.C. § 523(a)(8).

This conclusion in no way undermines the dignity of the state as a separate sovereign. This is not an instance in which Congress has enabled private parties to "haul" states into court against their will, *see Federal Mar. Comm'n v. South Carolina State Ports Auth.*, ___ U.S. ___, 122 S. Ct. 1864, 1874 n.11 (2002), but an instance in which Congress has granted states precisely the protection that they sought. Unlike a traditional lawsuit, in which a state is forced to defend itself against an accusation of wrongdoing, the bankruptcy process "is, shortly speaking, an adjudication of interests claimed in a *res*." *Gardner*, 329 U.S. at 574. If the state wishes to assert its interest in the *res*, it may do so. If it prefers not to, it may decline, and the debtor will still need to convince the bankruptcy court that repayment will constitute an "undue hardship." *See* 11 U.S.C. § 523(a).

At the Constitutional Convention, the states granted Congress the power to abrogate their sovereign immunity under Article I, section 8. In 11 U.S.C. § 106(a), Congress used that power to grant states a benefit they had sought. We **AFFIRM** the denial of TSAC's motion to dismiss and **REMAND** to the bankruptcy court for further proceedings.

CONCURRENCE

KENNEDY, Circuit Judge, concurring. Because I conclude that TSAC has waived its sovereign immunity by

filing a claim, I concur with the majority of the panel that the bankruptcy court has jurisdiction to hear this adversary proceeding. I cannot join the panel's opinion and I thus concur in the judgment only.

It is well-established that when a state files a proof of claim in a bankruptcy adjudication, "it waives any immunity it otherwise might have had respecting the adjudication of the claim." *Gardner v. New Jersey*, 329 U.S. 565 (1947).

On November 15, 1999, an authorized agent of Sallie Mae Servicing Corporation, the original holder of Hood's student loan debt, signed an assignment of proof of claim form transferring the debt to TSAC. The actual proof of claim was filed by Sallie Mae in the bankruptcy court on November 29, 1999. The assignment of that proof of claim form was filed one month later, on December 20, 1999. The assignment was effectuated with notice to TSAC and without objection from any party. Although there is no claims docket or claims register in the record, that is only because it is standard practice in that district not to have a claims docket or claims register in a no-asset Chapter 7 bankruptcy and it does not change the fact that a proof of claim was filed.

TSAC's first argument it [sic] that it was Sallie Mae – not the state – who filed the proof of claim, and Sallie Mae does not have the authority to waive Tennessee's sovereign immunity. Although Sallie Mae filed the proof of claim, it was a proof of claim on a debt owned by TSAC. TSAC had voluntarily undertaken to guarantee Hood's student loans, and accepted assignment of the debt from Sallie Mae. The assignment was made before the filing of the claim. Under

these circumstances, I think it is clear that TSAC voluntarily invoked the federal bankruptcy court's jurisdiction and waived its sovereign immunity.

TSAC's second argument (in the alternative) is that filing a proof of claim only constitutes waiver of its immunity from jurisdiction over the normal bankruptcy adjudication, but not for an "undue hardship" proceeding under 11 U.S.C. § 523(a)(8). Although the Supreme Court's decision in *Gardner v. New Jersey* clearly holds that filing a proof of claim waives a state creditor's sovereign immunity with respect to normal discharge proceedings, TSAC argues that the adversarial proceeding required by federal bankruptcy regulations is separate and distinct from the normal bankruptcy discharge proceeding.

I disagree. The determination of "undue hardship" is inextricably interrelated with the normal discharge proceeding such that the waiver of sovereign immunity in one extends to the other. *See Rose v. United States Dep't of Educ. (In re Rose),* 187 F.3d 926 (8th Cir. 1999) (state's submission of proof of claim waives its immunity in the "undue hardship" adjudication); *Burke v. State of Georgia Dep't of Revenue (In re Burke),* 146 F.3d 1313 (11th Cir. 1998) (filing proof of claim waives immunity in adversarial action to enforce a bankruptcy court's stay order against a state because it is sufficiently related to discharge proceeding). As the Eight Circuit noted in *In re Rose,* "[t]he text of the bankruptcy code makes clear that these procedures are both part of a larger whole; the same section that exempts educational debt from a general discharge establishes the ground of undue hardship as the exception to the exemption." 187 F.3d at 930. The structure of the statutory provision reveals that "undue hardship" is a defense – indeed, the only defense – to the state's general

privilege of exempting student loans from normal bankruptcy discharge proceedings.

Moreover, in filing a proof of claim, TSAC attempted to take advantage of the federal bankruptcy court's power to exempt student loans from general discharge proceedings. Further, if there had been assets in the estate, TSAC could have shared in those assets. Having attempted to benefit from the powers of the federal bankruptcy court, it must, therefore, accept the court's power to decide whether the hardship exception protects Hood from the general student loan exemption. *See New York v. Irving Trust Co.,* 288 U.S. 329, 332 (1933) ("If a state desires to participate in the assets of a bankrupt, she must submit to the appropriate requirements by the controlling power.").

Although I agree with the majority that we should not normally reach issues not raised before the bankruptcy court, we have recognized certain exceptions to that rule. In *Pinney Dock and Transport Co. v. Penn Central Corp.,* 838 F.2d 1445, 1461 (6th Cir. 1988), we held that we may reach an issue if it "is presented with sufficient clarity and completeness" for the court to resolve the issue. The Supreme Court has held that the decision to deviate from the general rule is a matter "left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff,* 428 U.S. 106, 121 (1976). Moreover, the Supreme Court has long recognized that we should not decide constitutional questions when their resolution is unnecessary to the outcome of the case. *Alexander v. Louisiana,* 405 U.S. 625, 633 (1972) (noting the "custom of avoiding decision of constitutional issues unnecessary to the decision of the case before us."). *See also Bejjani v. INS,* 271 F.3d 670, 687 (2002) (noting that "where possible, a court should rule on a narrow ground in

order to avoid a constitutional question.") While the issue of waiver was not raised in the bankruptcy court, the facts with respect to the filing of the claim are not in dispute, and the documents relied upon to establish those facts are from the bankruptcy court's records. In this case, the waiver question is presented with sufficient clarity and completeness to resolve the issues before this court without having to reach the complex constitutional questions raised by the parties.

ELECTRONIC CITATION:
2001 FED App. 0006A (6th Cir.)
File Name: 01b0006a.06

BANKRUPTCY APPELLATE PANEL OF THE SIXTH CIRCUIT

In re: PAMELA L. HOOD, Debtor.	)
PAMELA L. HOOD, Plaintiff-Appellee, v. TENNESSEE STUDENT ASSISTANCE CORPORATION, Defendant-Appellant.	) No. 00-8062

Appeal from the United States Bankruptcy Court
for the Western District of Tennessee,
Western Division at Memphis
No. 99-22606, Adv. Pro. 99-0847.

Argued: February 7, 2001

Decided and Filed: May 22, 2001

Before: AUG, MORGENSTERN-CLARREN, and RHODES, Bankruptcy Appellate Panel Judges.

COUNSEL

ARGUED: Sally Ramsey, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, for Appellant. William A. Cohn, COHN LAW FIRM, Cordova, Tennessee, for Appellee. **ON BRIEF:** Sally Ramsey, OFFICE OF THE

ATTORNEY GENERAL, Nashville, Tennessee, for Appellant. William A. Cohn, COHN LAW FIRM, Cordova, Tennessee, for Appellee.

AMENDED OPINION

STEVEN RHODES, Chief Bankruptcy Appellate Panel Judge. The Debtor, Pamela L. Hood, filed an adversary proceeding seeking a determination that her debt to the Tennessee Student Assistance Corporation (TSAC) is nondischargeable [sic] under 11 U.S.C. § 523(a)(8). The bankruptcy court denied TSAC's motion to dismiss based on sovereign immunity and TSAC appealed.

The Panel concludes that as a part of the plan of the Constitutional Convention, the States ceded to Congress their sovereignty over bankruptcy discharge matters. Therefore, the bankruptcy court's order denying TSAC's motion to dismiss is **AFFIRMED**.

I. ISSUE ON APPEAL

The sole issue on appeal is whether TSAC has sovereign immunity in bankruptcy discharge matters.

II. JURISDICTION AND STANDARD OF REVIEW

The Bankruptcy Appellate Panel of the Sixth Circuit has jurisdiction to decide this appeal. The United States District Court for the Western District of Tennessee has authorized appeals to the BAP. A final order of a bankruptcy court may be appealed by right under 28 U.S.C.

§ 158(a)(1). For purposes of appeal, an order is final if it "'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Midland Asphalt Corp. v. United States,* 489 U.S. 794, 798, 109 S. Ct. 1494, 1497 (1989) (citations omitted).

Hood filed a motion to dismiss this appeal, asserting that the order denying the motion to dismiss is not a final order. On September 19, 2000, the Panel denied Hood's motion, because the collateral order doctrine allows immediate appellate review of an order denying a claim of Eleventh Amendment Immunity. *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 52, 116 S. Ct. 1114, 1121 (1996); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 144-45, 113 S. Ct. 684, 688 (1993).

The application of a sovereign immunity defense is an issue of law subject to de novo review. *Seminole Tribe,* 517 U.S. 44. "De novo review requires the Panel to review questions of law independent of the bankruptcy court's determination." *First Union Mortgage Corp. v. Eubanks (In re Eubanks),* 219 B.R. 468, 469 (B.A.P. 6th Cir. 1998) (citation omitted).

III. FACTS

Between July of 1988 and February of 1990, Hood signed promissory notes for educational loans guaranteed by TSAC. On February 26, 1999, she filed a chapter 7 bankruptcy petition, at which time she owed money on these student loans. TSAC took no action in the bankruptcy case. On June 4, 1999, Hood was granted a discharge.

On October 14, 1999, she filed an adversary proceeding requesting discharge of her educational loans on the grounds of undue hardship under 11 U.S.C. § 523(a)(8). After TSAC was added as a defendant, it filed a motion to dismiss, asserting that the adversary proceeding was barred by sovereign immunity. The bankruptcy court denied the motion to dismiss, holding that 11 U.S.C. § 106 properly abrogated TSAC's sovereign immunity. TSAC filed this timely appeal.

IV. DISCUSSION

A. Introduction

This opinion holds that as a part of the plan of the Constitutional Convention, the States ceded their sovereignty over matters relating to the discharge in bankruptcy. In so holding, the Panel applies the analytical framework that the Supreme Court has now firmly established for determining the issue. *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 116 S. Ct. 1114 (1996). *See also Board of Trustees of the Univ. of Al. v. Garrett,* 531 U.S. 356, 121 S. Ct. 955, 962 (2001); *Alden v. Maine,* 527 U.S. 706, 730-33, 119 S. Ct. 2240 (1999); *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 120 S. Ct. 631 (2000); *Florida Prepaid Postsecondary Educ. Exp. Bd. v. College Sav. Bank* (II), 527 U.S. 627, 636, 119 S. Ct. 2199 (1999); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Exp. Bd.* (I), 527 U.S. 666, 672, 119 S. Ct. 2219 (1999).

The first step in this analysis is to recognize the sovereignty of the States and the important and inherent place of that sovereignty in our constitutional structure. Our focus is thus firmly fixed on this specific issue: Did the States cede their sovereignty over discharge matters in

bankruptcy as a part of the plan of the Constitutional Convention?

The next step is to review the role of the States in matters relating to the collection and discharge of debt at the time of the Constitutional Convention. This review demonstrates that for the purposes of collecting debt, the States utilized their sovereignty and power to nearly the greatest extent possible, including imprisoning debtors.

The next step is to examine The Federalist Papers, upon which the Supreme Court has often relied in resolving these issues, to determine the contemporaneous understanding of the circumstances in which the States yielded their sovereignty as a part of the formation of the Union. This examination discusses Hamilton's view that the States ceded their sovereignty whenever "a similar authority in the States would be absolutely and totally contradictory and repugnant." THE FEDERALIST NO. 32 at 152-53 (Alexander Hamilton) (Buccaneer Books, 1992). Although Hamilton did not explicitly discuss the application of this standard in the context of bankruptcy, he did conclude that when the States agreed to the naturalization clause, under which Congress was granted the power to enact "uniform" laws on that subject, the States did yield their sovereignty. Two powerful considerations compel the conclusion that the States must also have yielded their sovereignty over bankruptcy matters. First, the drafters of the Constitution utilized the same unique and identical language to empower Congress to enact "uniform" laws on these two subjects. Second, the conclusion that it would be contradictory and repugnant to allow sovereignty to both Congress and the States is as strong in the bankruptcy context as it is in the naturalization context.

The next part of the opinion demonstrates that throughout our history, the Supreme Court's decisions have consistently and repeatedly recognized that the sovereignty of the States is subject to the laws that Congress chooses to enact on bankruptcy matters. That binding precedent from the Supreme Court is inconsistent with the view that States retain their sovereignty in bankruptcy discharge matters.

Finally, the opinion explains that the statements in *Seminole Tribe* on which TSAC relies are dicta, to be accorded little weight in the analysis. The summary treatment given to this issue in the cases since *Seminole Tribe* is also discussed.

B. Sovereignty Is a Matter of the Plan of the Constitutional Convention.

The analysis of sovereign immunity in bankruptcy begins by examining the plan of the Constitutional Convention. "Although the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design." *Alden v. Maine,* 527 U.S. 706, 734, 119 S. Ct. 2240 (1999). In *Alden,* the Supreme Court observed:

> [T]he States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

Id. at 713.

The Supreme Court also stated, "The Eleventh Amendment confirmed rather than established sovereign immunity as a constitutional principle; it follows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design." *Id.* at 728-29. *See also Seminole Tribe,* 517 U.S. at 70 n.13.

Alexander Hamilton expressed this guiding principle in The Federalist Papers. "Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states. . . . " THE FEDERALIST NO. 81, at 414 (Alexander Hamilton) (Buccaneer Books, 1992). The Supreme Court has firmly embraced the principle that any surrender of sovereignty must be reflected in the plan of the Constitutional Convention. *See Seminole Tribe,* 517 U.S. at 70 n.13; *Alden,* 527 U.S. at 730.

Accordingly, the precise issue in this appeal is whether, as a part of the plan of the Convention, which granted Congress the authority to enact "uniform" bankruptcy laws, the States ceded to Congress their sovereignty over bankruptcy discharge matters.

C. Bankruptcy and Debt Collection in Early America.

At the time of the Constitutional Convention, the power and sovereignty of the States were fully engaged in the processes of private debt collection and of discharge from debt. Indeed, that power was engaged in the most coercive way available to the States. "Imprisonment for debt was commonplace in the colonies and then in the states, until the mid-nineteenth century." Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States,* 3 AM. BANKR. INST. L. REV. 5, 12 (1995).

The States' use of imprisonment for private debt collection was brought here from England. "For at least the preceding two centuries, the history of bankruptcy legislation in England was in essence continuous struggle over the power of the king, not only to tax his subjects but also to imprison those who did not pay their debts, and to seize the landholdings of traitors." *Bliemeister v. Industrial Comm'n of Az.* (*In re Bliemeister*), 251 B.R. 383, 390 (Bankr. D. Ariz. 2000), *aff'd on alternate grounds,* Case No. 00-1557-PHX (D. Az. Mar. 28, 2001) (holding that the State had waived sovereign immunity by failing to raise the defense in a timely manner and not reaching the issue whether the State had sovereign immunity in a bankruptcy proceeding). *See also Nelson v. La Crosse County District Attorney* (*In re Nelson*), 254 B.R. 436, 445 (Bankr. W.D. Wis. 2000), *rev'd*, 258 B.R. 374 (W.D. Wis. 2001); Garrard Glenn, *Fraudulent Conveyances and Practices,* Vol. 1, §§ 61-61c (Rev. ed. 1940).

In arguing for the passage of the first bankruptcy law in the United States, Daniel Webster stated, "I am free to confess my leading object to be to relieve those who are at present bankrupt, hopeless bankrupts, and who cannot be discharged *or set free* but by a bankrupt act passed by Congress." Charles Warren, *Bankruptcy in United States History,* 67 (1935) (emphasis added). Webster further observed, "[T]here are many who cannot come here to the seat of Government for fear of arrest by creditors in some intervening State or in the District of Columbia." *Id.* at 67-68. Webster's comments demonstrate how deeply the issue of a discharge from debtors' prison was bound up with state sovereignty.

As *Bliemeister* recently noted:

> In the colonies thousands of debtors were imprisoned, and while several states passed discharge provisions they were constitutionally suspect when applied to nonresident creditors. Indeed, some states had passed private acts to relieve individual debtors, which raised sovereignty questions when applied to creditors from other states and undoubtedly led to the concern for uniformity. Consequently bankruptcy law, and particularly the discharge, was very much an issue involved with states' sovereignty, because it was a limitation on the power of the sovereign to imprison debtors and punish traitors, or to grant individual relief.

Bliemeister, 251 B.R. at 390-91 (internal citations omitted). Thus, in these times, the States "discharged" debtors by private enactments releasing them from debtors' prison.

D. The Plan of the Constitutional Convention

This was the historical context that compelled the framers of our Constitution to include the Bankruptcy Clause in Article I. This clause states, "Congress shall have power ... To establish ... uniform Laws on the subjects of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. This historical context also compels the conclusion that the plan of the Convention necessarily included the States' surrendering their sovereignty over bankruptcy.

> For more than a century the broad interpretations of the Eleventh Amendment by the Supreme Court have been rooted in Alexander

> Hamilton's analysis of the judiciary's Article III powers in The Federalist No. 81[.] In *Seminole Tribe*[,] the majority cites to The Federalist No. 81 at least three times. A careful reading of the passage of The Federalist No. 81 reveals that Hamilton directed his readers to his article on Congress's power of taxation, The Federalist No. 32, for a discussion of the limits on state sovereignty imposed by the Constitution. In Federalist No. 32 Hamilton described state sovereignty as being lost in those areas in which Congress is granted the power to make uniform laws. Thus, at the inception of the Constitution, it was recognized that bankruptcy law required a subordination of state sovereignty.

Leonard Gerson, *A Bankruptcy Exception to Eleventh Amendment Immunity: Limiting the Seminole Tribe Doctrine,* 74 AM. BANKR. L.J. 1, 11 (2000) (footnotes omitted).

In the first Supreme Court decision addressing the Bankruptcy Clause of the Constitution, *Sturges v. Crowninshield,* 17 U.S. (4 Wheat) 122 (1819), Chief Justice Marshall recognized the importance and uniqueness of the uniformity requirement:

> The peculiar terms of the grant certainly deserve notice. Congress is not authorized merely to pass laws, the operation of which shall be uniform, but to establish uniform laws on the subject throughout the United States. This establishment of uniformity is, perhaps, incompatible with state legislation, on that part of the subject to which the acts of congress may extend.

Id. at 193-94.

In *Railway Labor Executives' Ass'n v. Gibbons,* 455 U.S. 457, 102 S. Ct. 1169 (1982), the Supreme Court reviewed in some detail the plan of the Convention as it pertains to this issue:

> The subject of bankruptcy was first introduced [at the Constitutional Convention] on August 29, 1787, by Charles Pinckney during discussion of the Full Faith and Credit Clause. Pinckney proposed the following grant of authority to Congress: "To establish uniform laws upon the subject of bankruptcies, and respecting the damages arising on the protest of foreign bills of exchange." 2 M. Farrand, Records of the Federal Convention of 1787, p. 447 (1911). Two days later, John Rutledge recommended that the following be added to Congress' powers: "To establish uniform laws on the subject of bankruptcies." *Id.,* at 483. The Bankruptcy Clause was adopted on September 3, 1787, with only Roger Sherman of Connecticut voting against. *Id.,* at 489. [n. 13]

Prior to the drafting of the Constitution, at least four States followed the practice of passing private Acts to relieve individual debtors. Nadelmann, On the Origin of the Bankruptcy Clause, 1 Am.J.Legal Hist. 215, 221-223 (1957). *Given the sovereign status of the States, questions were raised as to whether one State had to recognize the relief given to a debtor by another State. See Millar v. Hall,* 1 U.S. (1 Dall.) 229, 1 L.Ed. 113 (1788); *James v. Allen,* 1 U.S. (1 Dall.) 188, 1 L.Ed. 93 (1786). Uniformity among state debtor insolvency laws was an impossibility and the practice of passing private bankruptcy laws was subject to abuse if the legislators were less than

> honest. Thus, it is not surprising that the Bankruptcy Clause was introduced during discussion of the Full Faith and Credit Clause.

455 U.S. at 472.[1] (emphasis added.) Thus, the Supreme Court recognized that uniformity and state sovereignty are incompatible and that therefore the uniformity requirement in the Bankruptcy Clause was intended to impact state sovereignty in the most direct way.

In the Federalist No. 32, Hamilton describes and gives examples of the three ways state sovereignty is alienated:

> where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant . . . .

Id. at 388-89 (quoting THE FEDERALIST NO. 32, at 152-53).

Hamilton did not specifically address whether the authority of Congress over bankruptcy matters would conflict with the sovereignty of the States. Hamilton did, however, conclude that the power of Congress over naturalization was an example of the third way in which state sovereignty is ceded to the federal government.

[1] Interestingly, footnote 13 in this passage states, "'Mr. Sherman observed that Bankruptcies were in some cases punishable with death by the laws of England – & He did not chuse to grant a power by which that might be done here.' 2 M. Farrand, Records of the Federal Convention of 1787, p. 489 (1911)." 455 U.S. at 472.

Article I gives Congress the power "to establish an UNIFORM RULE of naturalization throughout the United States." Hamilton concluded, "This must necessarily be exclusive; because if each State had power to prescribe a DISTINCT RULE there could be no UNIFORM RULE." THE FEDERALIST NO. 32, at 152-53 (emphasis in original).

The same clause that grants Congress the authority to make uniform laws on naturalization also provides for uniform laws on bankruptcy. "Congress shall have power . . . To establish an uniform Rule of Naturalization, and uniform Laws on the subjects of Bankruptcies throughout the United States." U.S. CONST. ART. I, § 8, cl. 4. The parallel between naturalization and bankruptcy was noted in *Bliemeister*.

> The implication is unmistakable. The people and the states agreed in the original plan of the convention that if Congress should elect to act on the subject of bankruptcies, the states surrendered their sovereign powers on the subject. And as Hamilton indicated, the framers had taken "the most pointed care" to specify the states' surrender of their sovereignty on these very few, carefully selected subjects. The states no more retained sovereign powers over bankruptcy laws than they did over naturalization.

Bliemeister, 251 B.R. at 389-90. *See also Nelson,* 254 B.R. at 444.

The Panel agrees that the States ceded their sovereignty over bankruptcy matters at the Constitutional Convention, just as Hamilton concluded that the States ceded their sovereignty over naturalization matters. As noted, Hamilton observed that allowing the States to establish distinct rules regarding naturalization would

mean that there would be no uniform rules. That observation would apply with equal force in the context of bankruptcy. Indeed, although it may seem bizarre to contemplate in our modern times, it is nonetheless true that subordinating bankruptcy laws to the sovereignty of the States would permit the States to use their power and sovereignty to collect any debt, including both public and *private* claims. It would thus permit the States to ignore the bankruptcy process, including most importantly the discharge provisions of 11 U.S.C. § 524(a). This is precisely the result that the framers of the Constitution both foresaw and sought to preclude when they empowered Congress to enact "uniform" laws on bankruptcy. "When the states agreed to a uniform federal rule, they had to understand that they were surrendering their sovereignty over the subject of bankruptcies." *Bliemeister,* 251 B.R. at 391. *See also Nelson,* 254 B.R. at 445.

Moreover, the second of Hamilton's grounds upon which the States yielded their sovereignty also applies in the bankruptcy context. Here Hamilton concluded that state sovereignty was yielded when the Constitution grants authority to Congress while explicitly prohibiting that authority to the States. "The bankruptcy clause entails an ability to impair the obligations of contracts, a power which was expressly denied to the States by art. I sect. 10. See *Hanover Nat'l Bank v. Moyses,* 186 U.S. 181, 22 S. Ct. 857 (1902)." *Bliemeister,* 251 B.R. at 389.

A review of the pattern of Supreme Court cases recognizing limits on state sovereignty in bankruptcy also compels this conclusion.

E. Supreme Court Cases Limiting State Sovereignty and Sovereign Immunity in Bankruptcy.

The Supreme Court has consistently and repeatedly held that there are limits on state sovereignty within the bankruptcy context. These cases divide into two lines. The first line of cases explicitly and consistently permits the federal bankruptcy laws to impact the financial position of the state in its role as a creditor. The second line permits the federal bankruptcy laws to impact the sovereignty of the state in its legislative and judicial functions.

1. Supreme Court Cases Impacting the State as a Creditor

In *New Jersey v. Anderson,* 203 U.S. 483, 27 S. Ct. 137 (1906), the Supreme Court held that a state court's interpretation that a debt was a tax debt was not binding on the bankruptcy court.

> [A] state court, while entitled to great consideration, cannot conclusively decide that to be a tax within the meaning of a Federal law providing for the payment of taxes, which is not so in fact. The section (64a) itself declares that, in case of disputes as to the amount or legality of any such tax, they shall be heard and determined by the [bankruptcy] court. The state court may construe a statute and define its meaning, but whether its construction creates a tax within the meaning of a Federal statute, giving a preference to taxes, is a Federal question, of ultimate decision in this court.

Id., 203 U.S. at 491-92. If the Supreme Court in *Anderson* had believed that the States had retained their full sovereignty in the bankruptcy context, the Court certainly

would have required the bankruptcy court to abide by the state court's determination on the tax issue. Indeed, the Court's determination that the bankruptcy court has the *exclusive* jurisdiction on the state tax issue impacts both the State's role as a creditor and its role as a sovereign exercising its judicial function.

In *New York v. Irving Trust Co.*, 288 U.S. 329, 53 S. Ct. 389 (1933), the State specifically asserted sovereign immunity in response to an objection to the untimeliness of its proof of claim. The State argued that the power of the federal court to disallow its proof of claim is incompatible with state sovereignty. The Supreme Court flatly rejected this argument, stating, "The Federal Constitution clothes the Congress with power to establish uniform laws on the subject of bankruptcies." *Id.* at 331. The Supreme Court further stated:

> The Federal government possesses supreme power in respect of bankruptcies. If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise, orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated.

Id. at 333 (internal citation omitted).[2] Thus, the Supreme Court recognized that an orderly and expeditious

[2] Another Supreme Court case issued the same year demonstrates that this yielding of state sovereignty is limited. In *Missouri v. Fiske*, 290 U.S. 18, 54 S. Ct. 18 (1933), the Supreme Court refused to allow a private individual to seek relief against a State in federal court due to the State's sovereignty, even when the relief sought was the enforcement of a federal court's prior judgment. "The willingness of the

(Continued on following page)

bankruptcy process necessarily requires subordination of state sovereignty.

The same fundamental principle governed *Gardner v. New Jersey*, 329 U.S. 565, 67 S. Ct. 467 (1947), in which the Supreme Court held that the bankruptcy court has jurisdiction to deal with a state tax lien. The Supreme Court explained that if the bankruptcy court:

> lacked the power to deal with tax liens of a State, the assertion by a State of a lien would pull out chunks of an estate from the reorganization court and transfer a part of the struggle over the corpus into tax bureaus and other state tribunals. That would not only seriously impair the power of the court to administer the estate and adversely affect the power of the Interstate Commerce Commission and the court to promulgate a reorganization plan.

Id. at 577. Thus, once again, the Court recognized that the goals of bankruptcy could not be fulfilled if the reorganization court were not permitted to address the State's lien claims against estate property.

The Supreme Court further observed that:

> [t]he constitutional authority of Congress to grant the bankruptcy court power to deal with the lien of a State has been settled. In *Van Huffel v. Harkelrode*, 284 U.S. 225 (1931), the Court

Supreme Court to uphold the jurisdiction of the bankruptcy court in *Irving Trust*, as compared to its refusal to allow for jurisdiction in *Fiske*, reflects the inherently different status accorded a state's Eleventh Amendment immunity in bankruptcy." Gerson, 74 AM. BANKR. L.J. at 5.

> held that the bankruptcy court was constitutionally empowered to order a sale of property of a bankrupt free and clear of a lien of a State for taxes.

Gardner, 329 U.S. at 578.

In *Hoffman v. Connecticut Dep't. of Income Maint.,* 492 U.S. 96, 101, 109 S. Ct. 2818, 2823 (1989), the issue was whether the 1978 Bankruptcy Reform Act abrogated the sovereign immunity of the States in unmistakably clear language. In a plurality opinion, Justice White and three other justices concluded that 11 U.S.C. § 106 was not sufficiently clear. Nevertheless, Justice White stated, "[A] State that files no proof of claim would be bound, like other creditors, by discharge of debts in bankruptcy, including unpaid taxes[.]" *Id.,* 492 U.S. at 102. In this view, a State that seeks to be paid any distribution on its claim as a creditor must file a proof of claim like all other creditors. Four other justices concluded in dissent that the Bankruptcy Code did properly abrogate sovereign immunity. It thus seems likely that these four justices would agree with Justice White's conclusion regarding the States' need to file proofs of claim.

In any event, the issue of the States' need to comply with bankruptcy claims procedures was put to rest in the recent case of *Raleigh v. Illinois Dep't. of Revenue,* 530 U.S. 15, 120 S. Ct. 1951 (2000). Importantly, the Supreme Court decided this case after *Seminole Tribe, College Savings I, College Savings II* and *Alden.* The specific question in *Raleigh* involved the burden of proof on a contested proof of claim filed by the State in bankruptcy court. In the course of its opinion holding that this burden is the same in bankruptcy as it would be outside of bankruptcy, the Court stated, "[F]ederal law has generally

evolved to impose the same procedural requirements for claim submission on tax authorities as on other creditors[.]" 530 U.S. at 24. The Court also stated, "[T]ax litigation will be subject to an automatic stay[.]" *Id.* at 25. The significance of this case is that even after *Seminole Tribe* and its progeny, the Court has considered that the States are fully subject to the bankruptcy process, including the claims process and the automatic stay.

2. Supreme Court Cases Impacting the Sovereignty of the States in their Legislative and Judicial Functions

The Supreme Court has consistently recognized that the Constitutional authority of Congress to enact uniform bankruptcy laws necessarily impacts the sovereignty of the States in their legislative and judicial functions. This principle was summarized in *Stellwagen v. Clum,* 245 U.S. 605, 613, 38 S. Ct. 215 (1918):

> The federal Constitution, article I, section 8 gives Congress the power to establish uniform laws on the subject of bankruptcy throughout the United States. In view of this grant of authority to the Congress it has been settled from an early date that state laws to the extent that they conflict with the laws of Congress, enacted under its constitutional authority, on the subject of bankruptcies are suspended. . . . *Sturges v. Crowninshield,* 17 U.S. (4 Wheat.) 122, 4 L. Ed. 529; *Ogden v. Saunders,* 25 U.S. (12 Wheat.) 213, 6 L. Ed. 606.

In *Stellwagen,* the Court held that under § 70e of the Bankruptcy Act (repealed), a bankruptcy trustee could utilize a state law permitting recovery of fraudulent

conveyances, because the state law did not conflict with federal bankruptcy laws.

On the other hand, in *Perez v. Campbell,* 402 U.S. 637, 91 S. Ct. 1704 (1971), the Supreme Court held that a state law under which the State suspended a debtor's driver's license pending satisfaction of outstanding motor vehicle accident judgments did conflict with the federal bankruptcy discharge, and was thus unconstitutional. The sovereignty of the State to enact laws must yield to the bankruptcy discharge provisions enacted by Congress pursuant to its bankruptcy powers under the Constitution.

In *Butner v. United States,* 440 U.S. 48, 99 S. Ct. 914 (1979), the issue was whether a creditor's security interest extended to postpetition rents. The Supreme Court stated, "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law." *Id.,* 440 U.S. at 54. However, the Court emphasized:

> The constitutional authority of Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States" would clearly encompass a federal statute defining the mortgagee's interest in the rents and profits earned by property in a bankrupt estate. But Congress has not chosen to exercise its power to fashion any such rule.

Id. Significantly, Congress has now chosen to exercise its power to define the mortgagee's interest in the rents. *See* 11 U.S.C. § 552(b)(2).

Two recent decisions regarding restitution obligations also demonstrate the point. In *Kelly v. Robinson,* 479 U.S. 36, 107 S. Ct. 353 (1986), the Supreme Court held that under the provisions applicable in Chapter 7, a restitution

obligation in a criminal sentence is not dischargeable. 11 U.S.C. § 523(a)(7). On other [sic] hand, in *Pennsylvania Dep't. of Public Welfare v. Davenport,* 495 U.S. 552, 110 S. Ct. 2126 (1990), *superceded by statute,* the Supreme Court held that under the provisions of Chapter 13, the State's criminal restitution claim is a debt and is thus dischargeable. 11 U.S.C. § 101(12). Although the results of these cases differed, they did so because the applicable provisions of federal bankruptcy law differed. The Supreme Court did not permit the sovereign interest of the State in its criminal justice system to be a controlling or superior interest. Again, it is significant that Congress has since chosen to reverse the decision in *Davenport. See* 11 U.S.C. § 1328(a)(3).

Many other cases illustrate the principle. *See Brown v. Felsen,* 442 U.S. 127, 99 S. Ct. 2205 (1979) (A state court fraud judgment is not entitled to *res judicata* effect in bankruptcy court.); *Midlantic Nat'l Bank v. New Jersey Dep't. of Envtl. Protection,* 474 U.S. 494, 106 S. Ct. 755 (1986) (The state's objection to the trustee's motion to abandon contaminated property should be sustained not because the State was immune to the bankruptcy process, but because the trustee remained subject to applicable environmental regulations.); *Farrey v. Sanderfoot,* 500 U.S. 291, 111 S. Ct. 1825 (1991) (The creditor's state judicial lien was not avoidable under 11 U.S.C. § 522(f), but not because of any considerations of state sovereignty.); *Owen v. Owen,* 500 U.S. 305, 111 S. Ct. 1833 (1991) (In this case, the creditor's state judicial lien was avoidable under 11 U.S.C. § 522(f).).

In *Railway Labor Executives' Ass'n v. Gibbons,* the Supreme Court put this exclamation point on the issue, "The Framers sought to provide Congress with the power

to enact uniform laws on the subject *enforceable among the States*." 455 U.S. at 472. (emphasis added) (citation omitted). Similarly, in *International Shoe Co. v. Pinkus,* 278 U.S. 261, 265, 49 S. Ct. 108 (1929), the Supreme Court stated, "The national purpose to establish uniformity necessarily excludes state regulation. . . . States may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations." (citing *Prigg v. Pennsylvania,* 41 U.S. (16 Pet.) 539, 617, 618, 10 L. Ed. 1060 (1842); *Northern Pac. Ry. v. Washington,* 222 U.S. 370, 378, 32 S. Ct. 160 (1912); *St. Louis, Iron Mt. & S. Ry. v. Edwards,* 227 U.S. 265, 33 S. Ct. 262 (1913); *Erie R.R. Co. v. New York,* 233 U.S. 671, 681, 34 S. Ct. 756 (1914); *New York Central R.R. Co. v. Winfield,* 244 U.S. 147, 37 S. Ct. 546 (1917); *Erie R.R. Co. v. Winfield,* 244 U.S. 170, 37 S. Ct. 556 (1917); *Oregon-Washington Co. v. Washington,* 270 U.S. 87, 101, 46 S. Ct. 279 (1926).)

These decisions, impacting the States both as creditors and as sovereigns, demonstrate the Supreme Court's longstanding conclusion that state sovereignty is ultimately inconsistent with the authority of Congress to establish uniform laws on bankruptcy.

F. Seminole Tribe and its Progeny in the Supreme Court.

In *Seminole Tribe,* the Supreme Court specifically held that the Eleventh Amendment prevented Congress from abrogating the sovereign immunity of a State pursuant to the Indian Commerce Clause. The Supreme Court reasoned "that the Eleventh Amendment reflects the fundamental principle of sovereign immunity [that] limits the grant of judicial authority in art. III[.]" *Seminole Tribe,*

517 U.S. at 64 (internal quotation marks and citation omitted, alteration in original). The Court concluded "that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government." *Id.* at 72.

The Panel concludes that although it must remain faithful to the Court's constitutional analysis in *Seminole Tribe,* nothing in the Court's narrow holding of that case, relating to the issue of state sovereignty in the Indian Commerce context, precludes our holding here.

TSAC, however, relies on language in *Seminole Tribe* that goes beyond the issue of state sovereignty in the Indian Commerce context. In dicta, the Court broadly stated, "The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id.* at 72-73. In addition, in its response to Justice Stevens' dissenting opinion questioning the impact of this dicta on other Article I powers, including bankruptcy, *Id.* at 77, (Stevens, J., dissenting), the majority stated:

> Justice STEVENS understands our opinion to prohibit federal jurisdiction over suits to enforce the bankruptcy, copyright, and antitrust laws against the States. He notes that federal jurisdiction over those statutory schemes is exclusive, and therefore, concludes that there is "no remedy" for state violations of those federal statutes. Post, at 1134, n.1. That conclusion is exaggerated both in its substance and in its significance.

> First, Justice STEVENS' statement is misleadingly overbroad. We have already seen that *several avenues remain open for ensuring state compliance with federal law.* See n.14, supra. . . . Second, contrary to the implication of Justice STEVENS' conclusion, *it has not been widely thought that the federal antitrust, bankruptcy, or copyright statutes abrogated the States' sovereign immunity.* This Court has never awarded relief against a State under any of those statutory schemes[.] . . . Although the copyright and bankruptcy laws have existed practically since our Nation's inception, and the antitrust laws have been in force for over a century, *there is no established tradition in lower federal courts of allowing enforcement of those federal statutes against the States.*

Seminole Tribe, 517 U.S. at 72 n.16. (emphasis added.)

This summary treatment of the potential impact of subordinating bankruptcy laws to the sovereignty of the States demonstrates that the *Seminole Tribe* majority did not fully consider the issue. Indeed, the review of the cases in Part E. above fully disproves the majority's twin statements: (1) that it has not been widely thought that bankruptcy statutes abrogated the States' sovereign immunity and (2) that there is no established tradition of allowing enforcement of bankruptcy against the states. *See, e.g., Anderson, Irving Trust, Gardner, Perez, Davenport, Raleigh* and *Hoffman.* In each of these cases, it was assumed or stated that applicable federal bankruptcy law abrogated the States' sovereign immunity and in several of these cases, the Court fully enforced the bankruptcy process against the State involved. Thus, contrary to the dicta in

Seminole Tribe quoted above, these cases clearly demonstrate the Supreme Court's historical recognition that the States' sovereignty is limited in the area of bankruptcy.

Moreover, the alternative processes that *Seminole Tribe* offered to vindicate important federal bankruptcy rights and remedies are unrealistic in the bankruptcy context. Specifically, in footnote 14, the Supreme Court offered the following three alternatives:

> The Federal Government can bring suit in federal court against a State, *see, e.g., United States v. Texas,* 143 U.S. 621, 644-645, 12 S. Ct. 488, 493 (1892) (finding such power necessary to the "permanence of the Union"); an individual can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law, *see, e.g., Ex parte Young,* 209 U.S. 123, 28 S. Ct. 441 (1908); and this Court is empowered to review a question of federal law arising from a state-court decision where a State has consented to suit, *see, e.g., Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 5 L. Ed. 257 (1821).

Id., 517 U.S. at 71 n.14.

Unfortunately, in this footnote the Court did not have the opportunity to examine carefully whether such processes are indeed feasible in the context of the modern bankruptcy reality. Whatever the legal and practical feasibility of these processes in other contexts, it simply cannot be concluded that such alternative processes can succeed in vindicating important federal bankruptcy rights against the States, for three reasons. First, the sheer volume of such matters would be overwhelming in any process. In calendar year 2000, there were 1,253,444

bankruptcy cases filed. U.S. Bankruptcy Filings 1980-2000, American Bankruptcy Institute, *available at* http://www.abiworld.org/stats/1980annual.html (April 26, 2001). In the ten years from 1991 through 2000, there were 11,148,294 bankruptcy cases filed. *Id.* Although not quantified in government statistics, it is likely that a majority of these cases involved claims either against a State or involved the property interests of a State.

Second, each alternative would face substantial legal obstacles. *See* Laura B. Bartell, *Getting to Waiver – a Legislative Solution to State Sovereign Immunity in Bankruptcy after Seminole Tribe,* 17 BANKR. DEV. J. 17, 45-54 (2000).

Third, these alternatives almost certainly could not be carried out in a manner that would be consistent with the policies underlying modern bankruptcy law. These include:

The debtor's fresh start. *See Grogan v. Garner,* 498 U.S. 279, 282, 111 S. Ct. 654 (1991) (The purpose of the federal bankruptcy law is to give a debtor "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." citing *Local Loan Co. v. Hunt,* 292 U.S. 234, 244, 54 S. Ct. 695 (1934)); *Stellwagen v. Clum,* 245 U.S. at 617; *Williams v. U.S. Fid. & Guar. Co.,* 236 U.S. 549, 554-55, 35 S. Ct. 289 (1915) (The purpose of the federal bankruptcy law is to "relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.").

Maximum and equitable distribution to creditors. *See BFP v. Resolution Trust Corp.,* 511 U.S. 531, 563, 114 S. Ct. 1757 (1994); *Young v. Higbee Co.,* 324 U.S. 204, 210, 65

S. Ct. 594 (1945) ("[H]istorically one of the prime purposes of the bankruptcy law has been to bring about a ratable distribution among creditors of a bankrupt's assets; to protect the creditors from one another."); *Sampsell v. Imperial Paper Corp.,* 313 U.S. 215, 219, 61 S. Ct. 904 (1941). *See also* H.R. REP. NO. 103-835, at 33 (1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3341 (The Code is intended "to enforce a distribution of the debtor's assets in an orderly manner in which the claims of all creditors are considered fairly, in accordance with established principles rather than on the basis of the inside influence or economic leverage of a particular creditor.").

Therefore, the Panel concludes that although the decision in *Seminole Tribe* establishes the analytical framework to be applied in this appeal, its dicta about the application of that framework in the bankruptcy context is entitled to little weight in this appeal. *See Colgrove v. Battin,* 413 U.S. 149, 158, 93 S. Ct. 2448, 2453 (1973) ("We cannot, therefore, accord the unsupported dicta of these earlier decisions the authority of decided precedents."). *See also Central Green Co. v. United States,* 531 U.S. 425, 121 S. Ct. 1005, 1009 (2001); *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership,* 513 U.S. 18, 24, 115 S. Ct. 386 (1994); *Humphrey's Ex'r v. United States,* 295 U.S. 602, 627, 55 S. Ct. 869 (1935) (Dicta "may be followed if sufficiently persuasive" but are not binding.); *Cohens v. Virginia,* 19 U.S. (6 Wheat) 264, 399-400 (1821).[9]

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[9] In *Cohens,* the Supreme Court stated:

> It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go

(Continued on following page)

After *Seminole Tribe*, the Supreme Court issued five more decisions applying the doctrine that Congress cannot abrogate state sovereignty in the circumstances of the specific Article I powers at issue in those cases. *See Board of Trustees of the Univ. of Al. v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, 962 (2001) (Congress does not have the authority to abrogate state sovereignty under the Americans with Disabilities Act.); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S. Ct. 631 (2000) (The Age Discrimination in Employment Act does not provide Congress with the authority to abrogate state sovereignty.); *Alden v. Maine*, 527 U.S. 706, 730-33, 119 S. Ct. 2240 (1999) (Congress cannot abrogate state sovereignty in the Fair Labor Standards Act.); *Florida Prepaid Postsecondary Educ. Exp. Bd. v. College Sav. Bank* (II), 527 U.S. 627, 636, 119 S. Ct. 2199 (1999) (Congress does not have authority to abrogate state sovereignty pursuant to either the Commerce Clause or Patent Clause.); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Exp. Bd.* (I), 527 U.S. 666, 672 (1999) (The Trademark Remedy Clarification Act does not provide Congress with authority to abrogate state sovereignty.).

For two significant reasons, the Panel concludes that none of these decisions compels a conclusion that the

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beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens, 19 U.S. at 399-400.

federal bankruptcy process is likewise subject to the sovereignty of the States. First, none of these cases arose in the bankruptcy context. Second, the laws under review in those cases were enacted pursuant to clauses in the Constitution that do not have a uniformity qualification similar to the uniformity qualification for bankruptcy and naturalization laws.

G. The Progeny of Seminole Tribe.

In *Schlossberg v. Maryland* (*In re Creative Goldsmiths Of Washington, D.C., Inc.*), 119 F.3d 1140 (4th Cir. 1997), the Court of Appeals relied on the broad dicta in *Seminole Tribe* in holding that the State is immune from suit on a preference action. In refusing to find any distinction between the bankruptcy power and the other powers in Article I, the Fourth Circuit relied heavily on this statement by Justice Marshall in his dissent in *Hoffman*, "I see no reason to treat Congress' power under the Bankruptcy Clause any differently [than the Commerce Clause power, as addressed in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S. Ct. 2273 (1989)], for both constitutional provisions give Congress plenary power over national economic activity." *Hoffman*, 492 U.S. at 111 (Marshall, J., dissenting).

The Fourth Circuit's reliance on this statement is misplaced. First, the comment must be understood in the context in which it was made. In *Union Gas*, the Supreme Court had determined that Congress did have the authority under the Interstate Commerce Clause to abrogate state sovereign immunity. Accordingly, Justice Marshall's comment advocated that Congress also had the power to

abrogate state sovereign immunity under the Bankruptcy Clause.

> Marshall was arguing that nothing in the Bankruptcy Clause imposes a greater limit on the power of Congress than the Court in *Union Gas* had found to exist under the Interstate Commerce Clause. Justice Marshall had no reason to consider whether the Bankruptcy Clause might confer a broader power on Congress than had been granted under the Interstate Commerce Clause; this issue only arose after the Supreme Court later overruled its decision in *Union Gas* in *Seminole Tribe*.

Gerson, 74 AM. BANKR. L.J. at 13.

Second, neither Justice Marshall in his dissent in *Hoffman* nor the Fourth Circuit in *Creative Goldsmiths* looked at the plan of the Convention to determine if the States had ceded their sovereignty over bankruptcy, as required by *Seminole Tribe* and progeny.

Moreover, *Schlossberg* has been undermined by two subsequent Fourth Circuit decisions that do recognize the necessity of subordinating state sovereignty in bankruptcy. In *Maryland v. Antonelli Creditors' Liquidating Trust,* 123 F.3d 777 (4th Cir. 1997), the court held that the State was not immune from the enforcement of the debtor's confirmed chapter 11 plan, because, "the power of the bankruptcy court to enter an order confirming a plan ... derives not from jurisdiction over the state or other creditors, but rather from jurisdiction over debtors and their estates." *Id.* at 787.

Similarly, in *Virginia v. Collins* (*In re Collins*) 173 F.3d 924 (4th Cir. 1999), the court addressed the very issue

raised in the present appeal and held that the State is not immune to the bankruptcy court's jurisdiction over a dispute concerning the dischargeability of a debt. The court relied upon *Antonelli* and observed:

> The power of bankruptcy courts to discharge debt is fundamental to our bankruptcy system. If a state could assert Eleventh Amendment immunity to avoid the effect of a discharge order, the bankruptcy system would be seriously undermined. A person owing debts to a state could never have those debts discharged by a bankruptcy court unless the state agreed. Debtors owing money to states could not be assured of the opportunity for a "fresh start" heretofore guaranteed by the bankruptcy laws. As the Supreme Court has said, the purpose of the bankruptcy laws is to "give[ ] to the honest but unfortunate debtor ... a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Local Loan Co. v. Hunt,* 292 U.S. 234, 244, 54 S. Ct. 695, 78 L. Ed. 1230 (1934). This purpose can be fulfilled today only if the bankruptcy courts retain the power to discharge debts, including debts owed to states, consistent with established federal supremacy with respect to bankruptcy.

Id. at 930 (alteration in original) (citation omitted).

Three other decisions by courts of appeals deserve attention. In *Sacred Heart Hosp. of Norristown v. Pennsylvania, Dep't of Public Welfare* (*In re Sacred Heart Hosp. of Norristown*), 133 F.3d 237 (3d Cir. 1998), and in *Department of Transp. & Dev. v. PNL Asset Mgmt. Co. LLC* (*In re Fernandez*), 123 F.3d 241 (5th Cir. 1997), the courts summarily rejected the argument that the uniformity

requirement in the Bankruptcy Clause of the Constitution compelled a different conclusion than the conclusion reached by *Seminole Tribe* and its progeny in other Article I contexts. For example, in *Sacred Heart*, the court stated, "there is simply no principled basis to distinguish the Bankruptcy Clause from other Article I clauses." 133 F.3d at 243.

In so holding, the courts in *Sacred Heart* and *Fernandez* relied, in substantial part, on this one sentence in a concurring opinion by Justice Frankfurter in *Vanston Bondholders Protective Comm. v. Green,* 329 U.S. 156, 172, 67 S. Ct. 237, 244 (1946), "The Constitutional requirement of uniformity is a requirement of geographic uniformity."[4] *Id.* (Frankfurter, J., concurring). However, only two other justices joined Justice Frankfurter and the majority rejected so simple a view of the uniformity requirement. In that case, the issue was whether the federal bankruptcy court should allow interest on interest on a claim. A test based on geographic uniformity would have examined and applied state law. Instead, the Court stated, "In determining what claims are allowable and how a debtor's assets shall be distributed, a bankruptcy court does not apply the law of the state where it sits." 329 U.S. at 162. Further, "[w]hen and under what circumstances federal courts will allow interest on claims against debtors' estates being administered by them has long been decided by federal law." *Id.* at 163. The Court ultimately concluded that allowing such interest on interest "would not be in accord

[4] Significantly, Justice Frankfurter also stated, "Bankruptcy legislation is superimposed upon rights and obligations created by the laws of the States." 329 U.S. at 171. (Frankfurter, J., concurring).

with the equitable principles governing bankruptcy distributions." *Id.*

The third appellate court case applying *Seminole Tribe* in the bankruptcy context is *Mitchell v. Franchise Tax Bd. (In re Mitchell)*, 209 F.3d 1111, 1119 (9th Cir. 2000). In that case, the court limited its discussion to this statement: "In short, there is no policy-based exception – such as national uniformity – to the *Seminole Tribe* rule that Congress may not abrogate state immunity from suit under Article I." *Id.* In so ruling, the Court relied only on the broad dicta in *Seminole Tribe,* without further analysis.

Finally, it must be observed that the district court opinion in *In re Nelson,* 258 B.R. 374 (W.D. Wis. 2001), reversing the bankruptcy court's decision, treats the issue as summarily as *Mitchell*. The court's two sentence analysis simply states, "Both the Indian Commerce Clause and the Bankruptcy Clause are found in Article I of the Constitution. The holding of *Seminole* provides that the Bankruptcy Clause in Article I cannot be used to circumvent the Eleventh Amendment restriction of suits by private parties against states." *Id.* at 376.[5]

[5] In the recent case of *Arecibo Cmty. Health Care, Inc. v. Puerto Rico,* 244 F.3d 241 (1st Cir. 2001), the First Circuit joined the other courts that have given summary treatment to this issue: "We can see no principled reason to distinguish the legislation in this case, or to sustain its constitutionality, in the face of the Supreme Court's recent decision regarding sovereign immunity." *Id.* at 245 *(citing College Sav. Bank,* 527 U.S. 666).

A further problem with *Arecibo* is that it allows Puerto Rico to assert sovereign immunity even though both its proof of claim in the bankruptcy case and the adversary proceeding filed against it were

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These opinions are not binding on the Panel and the Panel finds the analysis in them unpersuasive. Accordingly, the Panel accords them no weight.

V. CONCLUSION

The States ceded their sovereignty over the bankruptcy discharge as a part of the plan of the Constitutional Convention. Where there is no sovereignty, there can be no sovereign immunity. Accordingly, TSAC is not immune in this dischargeability action and the order of the bankruptcy court denying TSAC's motion to dismiss is **AFFIRMED**.

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based on the same contract. Thus, this decision directly contravenes *Gardner*, 329 U.S. 565, which the Supreme Court reaffirmed in *College Sav. Bank*, 527 U.S. at 681 n.3 (*Gardner* "stands for the unremarkable proposition that a State waives its sovereign immunity by voluntarily invoking the jurisdiction of the federal court.").

BANKRUPTCY APPELLATE PANEL
OF THE SIXTH CIRCUIT

No. 00-8062

In re: PAMELA L. HOOD,

Debtor.

PAMELA L. HOOD,

Plaintiff-Appellee,

v.

TENNESSEE STUDENT ASSISTANCE CORPORATION,

Defendant-Appellant.

Before: AUG, MORGENSTERN-CLARREN, and RHODES, Judges of the Bankruptcy Appellate Panel.

AMENDED JUDGMENT

(Filed May 22, 2001)

On Appeal from the United States Bankruptcy Court
for the Western District of Tennessee at Memphis

This cause having been heard on the record from lower court proceedings and argued by counsel, it is the judgment of the Bankruptcy Appellate Panel that the bankruptcy court's order denying the Tennessee Student Assistance Corporation's motion to dismiss is AFFIRMED.

FOR THE PANEL

/s/ Leonard Green
Leonard Green, Clerk

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re	
PAMELA L. HOOD aka PAMELA L. TAGGART,	Case No. 99-22606-K
Debtor.	Chapter 7
PAMELA L. HOOD aka PAMELA L. TAGGART,	
Plaintiff,	
vs.	Adv. proc. No. 99-0847
TENNESSEE STUDENT ASSISTANCE CORPORATION, et al,	
Defendants.	

MEMORANDUM AND ORDER DENYING DEFENDANT'S PRETRIAL MOTION TO DISMISS ADVERSARY PROCEEDING COMBINED WITH NOTICE OF THE ENTRY THEREOF

(Filed Jul. 24, 2000)

In this action the defendant, Tennessee Student Assistance Corporation ("TSAC"), seeks a pretrial dismissal of the above-referenced dischargeability complaint previously filed under section 523(a)(8) of the Bankruptcy Code ("Code") by the plaintiff, Pamela L. Hood aka Pamela L. Taggart, the above-named chapter 7 debtor ("Debtor").

TSAC primarily argues that it is immune from this "suit" under the Code by virtue of the 11th Amendment of the United States Constitution.[1]

The sole question for judicial determination here is whether section 106(a) of the Code, as it relates to section 523(a)(8) of the Code, is a constitutionally permissible and valid abrogation of the TSAC's sovereign immunity under the 11th Amendment of the United States Constitution. This is an issue of first impression for this court.

For the reasons discussed below, the court finds and concludes in this core proceeding under 28 U.S.C. § 157(b)(2)(I), (A), and (O) that section 106(a) of the Code,[2]

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[1] The 11th Amendment states:

The Judicial power of the United States shall be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

[2] Section 106 of the Code provides, in its entirety, as follows:

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3) The court may issue against a governmental unit an order, process, or judgment under such sections or

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when read in conjunction with section 523(a)(8), is a constitutionally permissible and valid abrogation of TSAC's sovereign immunity under the 11th Amendment.

Although the parties have a strong difference of opinion regarding the outcome of this proceeding, the relevant background facts are not in dispute and may be briefly summarized as follows: Prior to bankruptcy, the

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the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

(4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

(5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

(b) A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

(c) Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

debtor incurred student loan debts. After filing an original, no-asset petition under chapter 7 of the Code, the debtor obtained a discharge. Of course, a chapter 7 discharge does not routinely discharge student loan debts. After this case was closed, the debtor moved to have it reopened for the special, limited purpose of filing this dischargeability complaint under section 523(a)(8) of the Code seeking a judicial determination in the bankruptcy court that the outstanding student loan debts owed to TSAC are dischargeable pursuant to the "undue hardship" exception.[3] See section 350(b) of the Code; FED. R. BANKR. P. 5010 and 4007(b). TSAC thereafter filed this motion seeking a pretrial dismissal of the debtor's pending section 523(a)(8) action for asserted lack of jurisdiction. Debtor opposes TSAC's motion to dismiss this proceeding. Perhaps it is important to note that the debtor only seeks a judicial determination that the particular student loan debts owed to TSAC are subject to a bankruptcy discharge based on the "undue hardship" exception under section 523(a)(8). No money judgment is sought by the debtor against TSAC or the State of Tennessee. Actually, the proceeding under

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[3] 11 U.S.C. § 523(a)(8) provides, in relevant part, as follows:

(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt –

* * *

(8) for an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship, or stipend unless exception [sic] such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

section 523(a)(8) is akin to a declaratory judgment action. See FED. R. BANKR. P. 7001(9).

TSAC contends that because it is an agency or instrumentality of the government of the State of Tennessee, it is immune from this proceeding filed in the United States bankruptcy court by virtue of the 11th Amendment.[4] Consequently, TSAC seeks a pretrial dismissal of this dischargeability action for asserted lack of jurisdiction stating that the enactment of section 106(a) of the Code, subjecting state governmental units to 60 specifically enumerated sections of the Code and the federal bankruptcy court's remedial powers, violates the 11th Amendment and also has been thwarted by the United States Supreme Court's non-bankruptcy decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) ("*Seminole Tribe*").[5]

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[4] 11 U.S.C. § 101(27) provides as follows:

> "governmental unit" means United States, State; commonwealth; District; Territory; municipality; foreign state; department; agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, A district, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

TSAC is a governmental corporation created by the Tennessee Legislature for the purpose of facilitating student loans in Tennessee. As such, it is an agency, unit, or instrumentality of the State of Tennessee. TENN.CODE ANN. §§ 49-4-201-212; 49-4-401-508.

[5] At issue in *Seminole Tribe* was whether the United States Congress had the power to abrogate the states' sovereign immunity pursuant to congressional authority under the Indian Commerce Clause in Article I of the Constitution when it enacted the Indian Gaming Regulatory Act. *Seminole Tribe* involved a private suit against an unconsenting state in a federal court. The Supreme Court

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As a result of the 11th Amendment and *Seminole Tribe*, among other cases, TSAC, in essence, argues that a state governmental unit can no longer be sued in the bankruptcy court for any type of significant relief, unless the state gives its express consent to such proceedings.[6] TSAC has given no such consent in the present action. If TSAC is correct in its legal position, the United States bankruptcy courts, in reality, are without meaningful authority to issue any orders, judgments, or decrees affecting the interests of a state or a unit of a state, absent the express consent of the governmental unit.[7]

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overturned an abrogation of the 11th Amendment immunity by means of an exercise of the Congress' Article I power under the Constitution's Indian Commerce Clause. The majority opinion, however, did not resolve (or even raise) the specific question whether the 11th Amendment also bars a suit under the Code against a unit of the government of a state in a federal court. The question of the 11th Amendment's possible impact on the bankruptcy laws was raised by Justice Stevens' dissenting opinion. *Id.* at 77. See Justin V. Switzer, *Note, Did They Really Think This Over? Seminole Tribe v. Florida and the Bankruptcy Code*, 34 HOUS. L. REV. 1243, 1257-58 (1997) (asserting that the majority in *Seminole Tribe* failed to address the Congress' power to abrogate states' immunity under the bankruptcy clause). Notwithstanding the dicta, *Seminole Tribe* held only that the 11th Amendment precluded the Congress from abrogating a state's constitutional immunity from suit in a federal court by means of a statute enacted pursuant to the Indian Commerce Clause in Article I, Section 8. Compare *Alden v. Maine Expense Board v. College Savings Bank*, 119 S.Ct. 2199 (1999); *College Savings Bank v. Florida Prepaid Postsecondary Edu. Expense Fund*, 119 S.Ct. 2219 (1999).

[6] State governmental units are among the largest creditors who appear in the bankruptcy courts. See *State Bankruptcy Survey Results*, BANKR. CT. DEC., WEEKLY NEWS AND COMMENT, at p. A1 (Nov. 19, 1996).

[7] See generally Richard Lieb, *Eleventh Amendment Immunity of a State in Bankruptcy Cases: A New Jurisprudential Approach*, 7 AM. BANKR. INST. L. REV. 269 (Spring 1999).

TSAC's motion to dismiss this complaint for lack of jurisdiction specifically provides as follows:

> "1. Pursuant to the Eleventh Amendment of the Constitution of the United States, the federal courts are without jurisdiction in suits brought by individuals against a State. The only exceptions to this rule are when the state has consented to such suit or when the suit is brought to enforce Fourteenth Amendment due process rights.
>
> 2. TSAC [Tennessee Student Assistance Corporation] is a unit of the government of the State of Tennessee.
>
> 3. TSAC has not consented to this suit.
>
> 4. This suit is not brought to enforce a constitutional right which has been denied without due process by the State of Tennessee.
>
> 5. Accordingly, the Eleventh Amendment of the United States [sic] deprives the court of jurisdiction to hear this suit."

Briefly and simply stated, the debtor, not surprisingly, opposes TSAC's motion to dismiss this complaint for lack of jurisdiction and primarily contends that section 106(a) of the Code is constitutional. Debtor, therefore, asserts that this court has jurisdiction over both TSAC and the subject matter of this complaint.

Student loan debts, along with a very limited number of others,[8] are specially treated under the Code. This type of debt (*i.e.*, a student loan) is not routinely discharged (or automatically excepted from discharge). Instead, the Congress established a unique approach to the dischargeability of student loan debts. Section 523(a)(8) of the Code allows for a discharge of a student loan debt upon the filing of a successful complaint by the debtor pursuant to FED. R. BANKR. P. 7001(6), when excepting such debt from discharge would impose an "undue hardship" on the debtor and the dependents of the debtor.[9] Also, a creditor (*e.g.*, TSAC) may file a complaint under section 523(a)(8) and FED. R. BANKR. P. 7001(6) seeking a judicial determination that a particular student loan debt is nondischargeable. See FED. R. BANKR. P. 4007(a). Interestingly, the bankruptcy court and the state court have concurrent jurisdiction to address the dischargeability of student loan debts under section 523(a)(8) of the Code.[10]

The debatable issue of the constitutionality of section 106(a) of the Code is ongoing and has engendered much discussion and controversy resulting in a sharply divided split of judicial authority among the lower federal courts and legal scholars.[11] This conflict of authority has created constitutional confusion and uncertainty resulting in a lack of uniformity in the nation's bankruptcy system.

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[8] See, e.g., 11 U.S.C. § 523(a)(1) (certain taxes) and (5) (alimony and child support).

[9] See also 42 U.S.C. § 292f(g) (regarding "HEAL" student loan debts).

[10] See 28 U.S.C. § 1334(b); cf. 11 U.S.C. § 523(c)(1).

[11] See, e.g., Lieb, *supra* note 8.

This court, like the court in *In re Straight,* 248 B.R. 403, 422 (B.A.P. 10th Cir. 2000), is of the opinion that a constitutional analysis of section 106(a) of the Code should be made on a statute-by-statute basis. Section 106(a) of the Code provides, in pertinent part, that "[n]otwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following: (1) Sections . . . 523. . . . " Section 106(a)(2) provides that the court may hear and determine any issue arising under the 60 specific sections enumerated in section 106(a)(1).[12] Section 106(a)(3) and (4) provide the statutory grounds for the court to issue an enforceable money judgment against a governmental unit in any of the 60 sections cited in section 106(a)(1), excluding an award of punitive damages.[13]

The law is well settled that a statute of the United States Congress (*e.g.,* section 106(a)) enjoys a presumption of constitutionality. See, among others, *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1 (1976). It is emphasized in

[12] Subsection (b) of section 106 of the Code was clarified in 1994 by allowing a compulsory counterclaim to be asserted against a governmental unit only where such unit has actually filed a proof of claim in the bankruptcy case. This has the effect of overruling contrary case law, such as *Sullivan v. Town & Country Nursing Home Serv., Inc.,* 963 F.2d 1146 (9th Cir. 1992); *In re Gribben,* 158 B.R. 920 S.D.N.Y. 1993); and *In re the Craftsman, Inc.,* 163 B.R. 88 (Bankr. W.D. Tex. 1994).

[13] Subsection (c) of section 106 was amended in 1994 to expressly provide for a waiver of sovereign immunity by governmental units with respect to monetary recoveries as well as declaratory and injunctive relief. It effectively overrules *Hoffman v. Connecticut Dept. of Income Maintenance,* 492 U.S. 96 (1989), and *United States v. Nordic Village, Inc.,* 112 S.Ct. 1011 (1992).

this action that any analysis of the constitutionality of a statute must begin with the presumption that the statute is constitutionally valid. *U.S. v. Nat'l Dairy Prods. Corp.,* 372 U.S. 29, 32 (1963); *U.S. ex rel. Madden v. General Dynamics Corp.,* 4 F.3d 827, 830 (9th Cir. 1993). It is further emphasized that this presumption is strongest when the Congress determines that it has the power to enact the statute. See, e.g., *Rostker v. Goldberg,* 453 U.S. 57, 64 (1981); see also Section 5 of the 14th Amendment[14] and Article I, Section 8, Clause 4 of the United States Constitution (discussed more fully infra).

It is now well established that the legislative acts adjusting the burdens and benefits of economic life [15] come

[14] The 14th Amendment provides, in relevant part here, as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No. State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

[15] Public interest and other social and economic concerns are injected into the federal bankruptcy laws. The general philosophy of the bankruptcy laws is "to give the [honest but unfortunate] debtor a 'new opportunity in life and a clear field for future effort, unhampered by the pressure of discouragement of preexisting debt.'" *Lines v. Frederick,* 400 U.S. 18, 19 (1970) (quoting *Local Loan Co. v. Hunt,* 292 U.S. 234, 244 (1934). A co-equal purpose of the bankruptcy laws is to promote equality of treatment among creditors similarly situated. In essence, the bankruptcy laws displace the various state debt collection processes in favor of a uniform collective process in the federal bankruptcy court.

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to the court with the presumption of constitutionality and that the burden is on the complainant to establish that the legislature has acted in an arbitrary and irrational way. *Ferguson v. Skrupal,* 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.,* 348 U.S. 483, 487-488 (1955); see also *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1 (1976). Indeed, it is well settled that a presumption exists in favor of the constitutionality of an act of the Congress. *Regan v. Time, Inc.,* 468 U.S. 641 (1984); *Rostker v. Goldberg,* 453 U.S. 57, 64 (1981). Mere uncertainty as to the constitutionality of a statute does not rebut that presumption. See, e.g., *In re Lombard-Wall, Inc.,* 44 B.R. 928 (Bankr. S.D.N.Y. 1984).

Bankruptcy laws are characterized by the inherent tension among divergent interests. There are many competing and countervailing interests to consider including the interests of state governmental units in given cases. It has been said that bankruptcy is a distinct system of jurisprudence – the nature of which is to sort out all of the debtor's legal relationships with others, and to apply the uniform principles and rules of the bankruptcy laws to those relationships, with the goal of either financially rehabilitating a distressed debtor or assembling and liquidating the debtor's asset for distribution to creditors. To accomplish these goals, modifications of pre-bankruptcy debtor-creditor relationships are required. Thus, a claim in bankruptcy may be satisfied in a manner far different from that which was originally contemplated by the parties. Pre-existing legal relationships are disturbed from a broad prospective, subject to many statutory safeguards. For example, a bankruptcy discharge is a privilege and not a constitutional right. *U.S. v. Kras,* 409 U.S. 434 (1973). Only honest debtors (who pay their case filing fees) receive bankruptcy discharges. *Local Loan Co. v. Hunt,* 292 U.S. 234, 244, (1934); 28 U.S.C. § 1930(a). Section 727(a) of the Code sets forth the statutory grounds to deny a debtor's general discharge. Notwithstanding an honest debtor's general discharge, as a matter of legislative policy, certain debts are not subject to a discharge by virtue of section 523(a) of the Code, which includes most student loan debts under section 523(a)(8).

The power granted by the Bankruptcy Clause in Article I, Section 8, Clause 4 of the Constitution [16] appears to be more plenary in nature than the Indian Commerce Clause[17] (or the Interstate Commerce Clause).[18] The unambiguous language of the Bankruptcy Clause constitutionally authorizes the Congress to establish uniform laws on the subject of bankruptcies throughout the United States. The constitutional authorization for the Congress to establish uniform (and rational) bankruptcy laws is seemingly paramount. See, e.g., *McVey Trucking, Inc. v. Secretary of State of Illinois (In re McVey Trucking, Inc.),* 812 F.2d 311 (7th Cir. 1987), *cert. den., sub. nom. Edgar v. McVey Trucking Co.,* 484 U.S. 895 (1987); see generally *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 247-302 (1985) (Brennan, J., dissenting), *reh'g den.*[19]

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[16] Article I, Section 8, Clause 4 of the Constitution provides, in relevant part, that the Congress shall have power "[t]o establish ... uniform Laws on the subject of Bankruptcies throughout the United States."

[17] Article I, Section 8, Clause 3 of the Constitution provides that the Congress shall have the power "[t]o regulate Commerce ... with the Indian Tribes."

[18] Article I, Section 8, Clause 3 of the Constitution also provides that the Congress shall have the power "[t]o regulate Commerce ... among the several States...."

[19] In the *McVey* case, the Seventh Circuit in a section 547(b) preference action under the Code against the State of Illinois held that the Congress may validly abrogate sovereign immunity pursuant to any of its plenary powers, including the bankruptcy powers. *Id.* at 323. Perhaps it is important to note that the Supreme Court denied certiorari in *McVey.* Actually, the Supreme Court later cited *McVey* with approval in *Pennsylvania v. Union Gas Co.,* 491 U.S. 1, 14-15 (1989) (plurality opinion).

In the instant action involving sections 106(a) and 523(a)(8) of the Code, this trial bankruptcy court fully recognizes and is judicially sensitive to the *strong* presumption of the constitutionality of section 106(a) of the Code. Concomitantly, the court adopts the well reasoned analysis of the Honorable A. Thomas Small in *In re York-Hannover Developments, Inc.*, 181 B.R. 271 (Bankr. E.D.N.C. 1995), a pre-*Seminole Tribe* decision, holding that the Congress was within its constitutional authority when it amended section 106(a) of the Code in 1994 to expressly abrogate the states' 11th Amendment and common law sovereign immunity with respect to the specifically enumerated Code provisions. See also, e.g., the following post-*Seminole Tribe* cases supporting constitutionality, *In re Willis,* 230 B.R. 619 (Bankr. E.D. Okla. 1999); *In re Renstrom,* 215 B.R. 454 (Bankr. N.D. Calif. 1997); the dissenting opinion in *In re Straight,* 248 B.R. 403, 421-430 (B.A.P. 10th Cir. 2000); contra, e.g., *In re Mitchell,* 222 B.R. 877 (B.A.P. 9th Cir. 1998); *Morrell v. Franchise Tax Bd.* (*In re Morrell*), 218 B.R. 87 (Bankr. C.D. Cal. 1997); *In re Taylor,* 249 B.R. 571 (Bankr. N.D. Ga. 2000).

The United States Supreme Court has articulated the following two-prong test to determine whether the Congress can validly abrogate states' 11th Amendment sovereign immunity: (1) whether the Congress unequivocally expressed its intent to abrogate the states' sovereign immunity, and (2) whether the Congress acted pursuant to a valid exercise of power. *See, e.g., Seminole Tribe,* 577

U.S. at 55-56.[20] Judge Small held in *In re York-Hannover Developments, Inc.*, 181 B.R. 271 (Bankr. E.D.N.C. 1995), that the Congress was within its constitutional authority when it passed section 106(a) of the Code. Judge Small recognized that section 106(a) is an unmistakably clear abrogation of the states' sovereign immunity as it relates to section 106(a) of the Code. Judge Small further recognized that the Code contains a vast number of privileges and immunities which are validly enforceable through Section 5 of the 14th Amendment; and he rightfully concluded that section 106(a) was validly enacted pursuant to the 14th Amendment and is, therefore, a constitutionally permissible and valid exercise of the judicial power of the United States.

The sovereign immunity of a state cannot always be readily reconcilable with the Congress' exercise of the Bankruptcy Clause contained in Article I, Section 8, Clause 4, of the Constitution. The national scope of the federal bankruptcy laws and underlying policies[21] preclude

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[20] See also *Green v. Mansour,* 474 U.S. 64, 68 (1985), cited with approval in *Seminole Tribe,* 577 U.S. at 55-56.

[21] The Supreme Court has addressed the purposes of the bankruptcy laws on various occasions. For example, in In [sic] *Stellwagen v. Clum,* 245 U.S. 605, 617 (1918), the Court stated:

> "The federal system of bankruptcy is designed not only to distribute the property of the debtor, not by law exempted, fairly and equally among his creditors, but as a main purpose of the act, intends to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character, after the property which he owned at the time of bankruptcy has been administered for the benefit of creditors. Our decisions lay great stress upon this feature of the law – as one not only of private but of great public interest in that it secures to the unfortunate debtor, who

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a state, or a unit of a state, from inappropriately intruding upon the Congress' exercise of its bankruptcy and 14th Amendment powers. See generally, *New York v. Irving Trust Co.,* 288 U.S. 329 (1933). The Supreme Court in *Fitzpatrick v. Bitzer,* 427 U.S. 445, 456 (1976), recognized Section 5 of the 14th Amendment as being a constitutionally acceptable source or means of abrogating states' sovereign immunity.[22] TSAC's legal position in this action summarily frustrates and denies the full meaning and effectiveness of the uniform laws of the United States Congress relating to bankruptcy, especially when considering the Supremacy and Bankruptcy Clauses in connection with the 14th Amendment. See, e.g., *Perez v. Campbell,* 402 U.S. 637 (1971).

The two-prong test articulated by the Supreme Court in *Seminole Tribe* is constitutionally satisfied here: that is, (1) the Congress unequivocally expressed its clear intent in section 106(a) of the Code to abrogate the states' sovereign immunity, and (2) the Congress acted pursuant to a

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surrenders his property for distribution, a new opportunity in life. *Neal v. Clark,* 95 U.S. 704, 709, 24 L.Ed. 586; *Traer v. Clews,* 115 U.S. 528, 541, 6 Sup.Ct. 155, 29 L.Ed. 467; *Hanover National Bank v. Moyses,* 186 U.S. 181, 192, 22 Sup.Ct. 857, 46 L.Ed. 1113; *Wetmoer v. Markoe,* 196 U.S. 68, 77; 25 Sup.Ct. 172, 49 L.Ed. 390, 2 Ann. Cas. 265; *Burlingham v. Crouse,* 228 U.S. 459, 473, 33 Sup.Ct. 564, 57 L.Ed. 920, 46 L.R.A. (N.S.) 148."

[22] See also *Pennsylvania v. Union Gas Co.,* 491 U.S. 1 (1989) (plurality) (holding that the Congress may validly abrogate sovereign immunity pursuant to its plenary power under the Interstate Commerce Clause); cf. *United States v. Nebraska (In re Doiel),* 228 B.R. 439, 443 (D.S.D. 1998) (citing numerous opinions holding that the Congress cannot abrogate states' immunity under the 14th Amendment).

valid exercise of its power under the 14th Amendment (and Article I, Section 8, Clause 4 of the Constitution). See *In re Willis,* 230 B.R. 619 (Bankr. E.D. Okla. 1999), for a scholarly analysis of this issue. This result also is consistent with the Supreme Court's prior recognition that the collective nature of a uniform system on the subject of the federal bankruptcy laws requires that some limitations be imposed upon states' sovereign immunity. Compare, e.g., *International Shoe Co. v. Pinkus,* 278 U.S. 261, 265 (1929); *also compare Innes v. Kansas State University (In re Innes),* 184 F.3d 1275 (10th Cir. 1999).[23] Considering the national scope and intent of the uniform bankruptcy laws and the congressional policies that underlie them, it additionally is noted that the Supreme Court has been protective of the bankruptcy court's jurisdiction. See, e.g., *New Jersey v. Anderson,* 203 U.S. 483 (1906); *New York v. Feiring,* 313 U.S. 283, 285 (1941); *Reitz v. Mealey,* 314 U.S. 33 (1941); *Perez v. Campbell,* 402 U.S. 637 (1971).

In light of all the foregoing, this court respectfully believes that the Supreme Court would hold, in the context of a given bankruptcy case under title 11 of the United States Code, that section 106(a), as it relates to

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[23] In *In re Innes,* supra, the 10th Circuit Court of Appeals held that Kansas State University waived its 11th Amendment immunity – and thereby submitted to the jurisdiction of the bankruptcy court for the purpose of an adversary proceeding to determine "undue hardship" under section 523(a)(8) – when the university entered into a federal student loan participation contract that explicitly required it to perform the functions and activities set forth in 34 C.F.R. § 674. *In re Innes,* 184 F.3d at 1281. This regulation, inter alia, requires an educational institution to honor a bankruptcy court's stay under section 362(a) and to follow certain other enumerated procedures if properly served with a student loan dischargeability complaint under the Code.

section 523(a)(8), is a constitutionally valid and appropriate abrogation of the states' sovereign immunity under the 11th Amendment. Until the Sixth Circuit Court of Appeals or the United States Supreme Court resolves this critical issue, this court will rely on the strong presumption in favor of the constitutionality of section 106(a) and the persuasive reasoning of, e.g., *In re York-Hannover Dev., Inc.*, 181 B.R. 271, and *In re Willis*, 230 B.R. 619.[24]

The court also has considered a recent article that appears in THE AMERICAN BANKRUPTCY LAW JOURNAL, Vol. 74 (Winter 2000), entitled *A Bankruptcy Exception to Eleventh Amendment Immunity Limiting the Seminole Tribe Doctrine*. After a comprehensive analysis and discussion of the pertinent issues and relevant case law, the author concludes as follows:

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[24] As discussed earlier, the Supreme Court never has held that the 11th Amendment bars the Congress from abrogating the states' sovereign immunity under the Bankruptcy Clause. The dicta in *Seminole Tribe* is subject to revisitation in a new context (*i.e.*, a re-examination within the confines of a particular bankruptcy case under title 11 of the United States Code). Dicta is not covered by the doctrine of collateral estoppel because this doctrine requires that the conclusion sought to be given preclusive effect actually formed a necessary part of the ultimate decision reached by the court. That is, a significant corollary to the doctrine of collateral estoppel is that dicta have no preclusive effect. See, e.g., *In re Cassidy*, 892 F.2d 637, 640 (7th Cir. 1990); *Coleman v. Miller*, 117 F.3d 527, 530 n. 7 (11th Cir. 1997); *Ducey v. U.S.*, 830 F.2d 1071, 1072 (9th Cir. 1987); *Russell v. C.I.R.*, 678 F.2d 782, 785 (9th Cir. 1982); *In re Professional Investment Properties of America, Inc.*, 157 B.R. 166 (Bankr. W.D., Wash. 1993); *In re Access Beyond Technologies, Inc.* 237 B.R. 32 (Bankr. D. Del. 1999). Dicta does not constitute binding precedent. See, e.g., *Colgrove v. Battin*, 413 U.S. 149, 157 (1973) (declining to follow dicta stating that the 7th Amendment requires a jury of 12 persons in civil trials); see also *U.S. v. DiFrancesco*, 449 U.S. 117 (1980).

> The Supreme Court has recognized that "the Eleventh Amendment implicates the fundamental constitutional balance between the Federal Government and the States." This balance will be lost in the operation of the Bankruptcy Code, if states have the option of excluding themselves from the system's operation. The Bankruptcy Clause's uniformity requirement, the system's distinctive collective nature and past Supreme Court precedent provide an ample basis for upholding the abrogation of state sovereign immunity in § 106(a) of the Bankruptcy Code without undermining a broad interpretation of Eleventh Amendment immunity. As is true of most areas of the law, the *Seminole Tribe* doctrine also requires its exceptions, if it is to remain a viable rule of constitutional law.[25]

For the reasons discussed above, and especially relying upon the strong presumption of constitutionality existing here, the court finds and concludes in this action that section 106(a) of the Code, as it specifically relates to section 523(a)(8), permissibly, validly, and constitutionally abrogates TSAC's sovereign immunity under the 11th Amendment, notwithstanding TSAC's arguments or the *Seminole Tribe* (and related) dicta previously mentioned. This court also expressly finds, for the reasons articulated by TSAC, that TSAC is an agency or instrumentality of the State of Tennessee. TSAC has not, however, demonstrated or established that the Congress acted in an arbitrary and irrational way when it passed sections

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[25] 74 AM. BANKR. L.J. 1, 31 (Winter 2000).

106(a) and 523(a)(8) of the Code.[26] Thus, the requirements have been met in this action to abrogate TSAC's sovereign immunity under the 11th Amendment. The Congress has not exceeded its authority.

Accordingly, the debtor's complaint previously filed under section 523(a)(8) of the Code against TSAC will be allowed to proceed to a full trial on the merits in the United States bankruptcy court to ultimately determine whether the student loan debts in question actually are subject to a bankruptcy discharge. TSAC's pretrial motion seeking to dismiss the debtor's dischargeability complaint under section 523(a)(8) of the Code for lack of jurisdiction is hereby denied. This result does not undermine the 11th Amendment immunity of the States. Instead, it simply means that this dischargeability action under section 523(a)(8) will be heard and decided in the bankruptcy court, rather than the state court, pursuant to the concurrent and bifurcated jurisdictional scheme established under 28 U.S.C. §§ 1334(a)-(b), 157(a)-(d), and 151.

Based on the foregoing and consideration of the case and adversary proceeding records as a whole,

IT IS ORDERED AND NOTICE IS HEREBY GIVEN that the motion of the defendant, TSAC, seeking to dismiss the plaintiff-debtor's complaint previously filed under section 523(a)(8) of the Code is denied and a pretrial

[26] TSAC bears the burden of showing that it is entitled to sovereign immunity under the 11th Amendment. *Ferguson v. Skrupal,* 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.,* 348 U.S. 483, 487-488 (1995); see also *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1 (1976).

conference to consider this adversary proceeding will be held on August 15, 2000, at 10:00 a.m.

BY THE COURT

/s/ David S. Kennedy
DAVID S. KENNEDY
CHIEF UNITED STATES BANKRUPTCY JUDGE

DATED: July 24, 2000

cc: William A. Cohn, Esquire
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UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

In re: Bankruptcy Case No. 99-22606

Pamela L. Hood
Debtor

Pamela L. Hood
Plaintiff(s) Adversary No. 99-00847

United States of America et al.
Defendant(s)

NOTICE OF ENTRY OF JUDGMENT

(Filed Jul. 24, 2000)

On 7/24/00

, the following order was entered:

> Memorandum and Order Denying Defendants [19-1] Motion To Dismiss Complaint For Lack Of Jurisdiction by Tennessee Student Assistance Corp. A Pretrial Conference Will Be Held On 8/15/00 at 10:00 a.m.

I certify that on this date a copy of this notice was mailed to the following:

> William A. Cohn, Attorney for debtor Salley Ramsey, Attorney for defendant, TSAC Madalyn S. Greenwood, Assistant U.S.T. Edward L. Montedonico, Chapter 7 Trustee Monica M. Simmons, Assistant U.S. Attorney
>
> JED G. WEINTRAUB
> Clerk of the Bankruptcy Court
>
> By: /s/ Hertha Robertson
> Deputy Clerk

Date: 07/24/00

Entered on the Court docket on 07/24/00
and mailed on the same date to: JUL 24 2000
(x) Debtor, debtor's attorney, and trustee
( )

HRobertson, Deputy Clerk
UNITED STATES BANKRUPTCY COURT

Case No: 01-5769

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ORDER

In re: PAMELA L. HOOD

Debtor

PAMELA L. HOOD

Appellee

v.

TENNESSEE STUDENT ASSISTANCE CORPORATION;

Appellant

ATTORNEY GENERAL OF OHIO, and 17 other States and Territories

Amicus Curiae

BEFORE: KENNEDY and MOORE, Circuit Judges; DOWD, District Judge.*

(Filed Feb. 26, 2003)

Upon consideration of the appellant's motion to stay mandate.

It is ORDERED that the mandate be stayed to allow the appellant time to file a petition for a writ of certiorari, and thereafter until the Supreme Court disposes of the case, but shall promptly issue if the petition is not filed

* The Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

within ninety days from the date of final judgment by this court.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green/sjc
Leonard Green, Clerk